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ABSTRACT

This document consists of the speeches given at the 1971 New Jersey School Law Forum. The Forum is held to encourage the research of timely legal issues involving the structure and operation of the New Jersey public schools, to assist the school law practitioner by affording him the opportunity to hear and discuss research and opinion on selected topics, and to provide a vehicle for the preservation and dissemination of school law research. The subjects presented in the speeches are (1) drug abuse control: The law and school board policies; (2) the law of nontenure teacher dismissals--a challenge for change; (3) attorneys' fees for bond work; (4) the New Jersey student suspension and expulsion law; (5) the public right-to-know law and school board documents; and (6) processing the teacher dismissal case. (JF)

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Journal of The Proceedings

School Law Forum

Atlantic City, New Jersey — October 28, 1971

Sponsored by: The New Jersey School Boards Association
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About the Forum . . .

For many years, the New Jersey Association of School Board Attorneys graciously accepted the responsibility of planning "attorneys' sessions" which were held in conjunction with the Annual Workshop of the New Jersey School Boards Association.

In an effort to expand the service which was rendered by these sessions, the Attorneys' and School Boards Associations joined with the National Organization on Legal Problems of Education (NOLPE) to develop and sponsor a more formal approach which would draw on a large pool of legal and administrative talent, to tackle a broad area of issues in school law on a non-partisan basis.

The purpose of the School Law Forum is thus threefold:

- To encourage the research of timely legal issues involving the structure and operation of the public schools of New Jersey;
- To assist the practitioner of school law by affording the opportunity to hear and discuss research and opinion on selected topics in the highest tradition of the classic forums and academies;
- To provide a vehicle for the preservation and dissemination of school law research, through publication of a Journal of the Proceedings of the Forum.

The success of the present School Law Forum will assure the future of this format. That more programs of this type will be generated cannot be doubted, so long as the government of this most densely populated state continues the largest and most important public enterprize -- that of educating its young people.

At this time it is appropriate to dedicate the work of this School Law Forum to all those individual attorneys and educators whose efforts have brought the practice of school law in New Jersey to the point where this School Law Forum has been made possible.

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I

Drug Abuse Control: The Law and School Board Policies

PETER P. KALAC, ESQ.

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When the little red schoolhouse began to disappear from the American educational scene very few educators, or for that matter, very few people generally anticipated the drastic changes that were in store. The task of providing a thorough and efficient free public school system became more complex with each passing year.

School boards in this state, of necessity, became involved in many functions which were not directly related to the formal education of the young, but were important nonetheless in the operation of a school system. Practically every school board in this state is involved to some extent in the transportation business, construction business, sewer business, public relations business and more recently, the labor relations business. Boards have, despite their constant turnover in membership, done a remarkable job in handling these problems. The best example of this was three years ago when our legislature passed Chapter 303 (34:13A-1, et seq.). When that legislation became effective, September 13, 1968, suddenly boards all over the state were cast into the labor negotiations business. The change was sudden; most boards were unprepared and the art of negotiation was foreign. However, after the initial traumatic experience, boards have learned to negotiate, and negotiations generally are becoming more settled.

Although no one can state with any degree of authority what is negotiable and what is non-negotiable, nevertheless, boards have learned to adapt to the negotiations process and in my opinion, the crisis stage is behind us.

The present and perhaps most menacing crisis which is facing each of the 601 school districts in this state, deals with the problem of controlling the sale and use of drugs in the school. The degree to which boards will be successful in facing this new challenge is still not known. The problem appears to be larger and more complex than any previous crisis boards of education have had to face.

Experimental drug abuse control programs are being put into effect in many districts throughout the country. The approach taken depends in most instances on the severity of the problem. In certain cities, police have been granted permanent in-school facilities. It was reported in the August 8, 1966 edition of Newsweek, that in Tucson, Arizona, police were "given offices in junior high schools which practically amount to substations." A similar program in Flint, Michigan, resulted in the apprehension of 1,634 juvenile offenders whose cases were handled through "informal counseling." I am not aware of any New Jersey school board which has gone this far. However, I suspect certain boards may have given it some serious consideration.

The situation in the New York City School system appears to be overwhelming as anyone who reads the daily paper is aware.

The New York Times, on November 13, 1970, reported that the District Attorney of the Bronx, as a result of numerous inquiries, was releasing a set of guidelines covering what actions can be taken by school personnel in order to control the sale and use of drugs in the schools. In summary, the guidelines provide that if

school personnel have reasonable suspicion of drug possession, they can search students, their lockers and desks. Reasonable suspicion is defined as more than mere suspicion "and should be based on concrete personal observations and/or information obtained from other students which is apparently reliable." The guidelines also provide that "all personal searches are to be made by school personnel, preferably without the aid of police officers."

Whether these guidelines have been fully implemented and how successful this approach has been cannot be determined at this early date. As attorneys, however, I am certain you can recognize the many constitutional questions that can be raised by the implementation of these guidelines.

The constitutional issue involved in search and seizure is not the theme of this report. That subject has been covered at length in many articles and most recently in the latest edition of Nolpe School Law Journal. This latest article, "Search and Seizure in the Public Schools," is recommended reading.*

What is intended here is that we review what steps have been taken in New Jersey at the state level in order to stem the tide of drug abuse in the schools and what might be done by the local boards to implement an effective drug abuse program.

Chapter 85 of the Laws of 1970 (18A:4-28.4 through 18A:4-28.8) became effective on June 3 of last year. This legislation unquestionably was the result of a crisis situation which had developed in this area of drug use by school age children. The legislation specifically directs the Commissioner of Education to establish summer workshops and training programs to train selected teachers to

*Ed. note: Nolpe School Law Journal, Vol. I, No. 2, p. 20 et seq.

teach a drug education program to all secondary school teachers throughout the state. These workshops and training programs were also intended to develop a curriculum and drug education unit to be incorporated into the ongoing health education curriculum of secondary students. The legislation provides that the training program shall contain basic content on:

> "...the history, pharmacology, physiology and psychosocial aspects of drugs generally abused by young people, treatment and rehabilitation programs, the legal aspects of drugs and the extent of drug abuse in New Jersey."

The selected teachers who are so trained are then required to bring their knowledge back to their respective school districts and educate all secondary teachers in the district. Every secondary teacher was required to attend eight one and one-half hour training sessions conducted by the newly trained group of selected teachers. The legislation then goes on to provide that on or after January 15, 1971 each school district having secondary school grades shall incorporate into its health education curriculum the recommended drug education unit mentioned above.

The theory behind this legislation, namely educate selected teachers concerning drug use and its related problems, have these teachers educate all other secondary teachers and then have the secondary teachers educate the students, is basically sound. The underlying concept is that any student who is properly apprised of the consequences of drug use should shun drugs.

Unquestionably, it can be argued that knowing the consequences of drug use will not necessarily convince a drug user to discontinue his habit. Nevertheless, since the institution of this drug abuse program, I find that more students are apparently coming forward and seeking help because teachers and guidance personnel are asking the questions -- What should I do when a student confides in me

regarding his drug problem and asks for my help? Must I report to the police any information obtained from a drug counseling program concerning violations of New Jersey's drug control statutes?

Perhaps some of you have been asked these same questions. And perhaps you have done some research and found that N.J.S. 2A:97-2 provides that:

> "Any person having knowledge of the actual commission within the jurisdiction of this state of...any high misdemeanor, who conceals and does not, as soon as may be, disclose and make known the same to a judge, magistrate, prosecutor or police authority, is guilty of a misdemeanor."

You may then have reviewed The New Jersey Controlled Dangerous Substance Act and found that N.J.S. 24:21-20 provides that any person who knowingly and intentionally possesses, actually or constructively, a controlled dangerous substance as classified in Schedule I or II which is a narcotic drug or any other controlled dangerous substance; or possesses more than twenty-five grams of marijuana or more than five grams of hashish is guilty of a high misdemeanor.

Herein lies the dilemma in New Jersey's drug abuse program. Law enforcement officials readily argue that N.J.S. 2A:97-2 is unambiguous and requires that educators report to them information obtained in drug counseling programs.

Educators on the other hand take the position that any drug counseling program which does not retain confidentiality will soon become meaningless and inoperative. They also question taking the risk of being charged as a misdemeanant for failing to report the information obtained from their students. Conflicts of this type are to be expected when legislation is enacted which is innovative.

In view of this conflict, a closer analysis of N.J.S. 2A:97-2 is warranted. Specifically, the question must be asked -- When does an educator have "knowledge

of the actual commission...of...any high misdemeanor" and secondly, what does the wording "conceals and does not...disclose and make known..." really mean?

There is a dearth of New Jersey case law interpreting this misprision statute and no reported New Jersey case analyzes the wording "knowledge of the actual commission."

The case law interpreting the federal misprision statute is considerably more helpful. The federal statute (Title 18 USC, Article 4) is essentially the same as the New Jersey legislation.

In the case of Maine v. Michaud, 114 A2d 352 (1955), (Supreme Court of Maine), the required "knowledge" was described as follows:

> "It must be actual and personal knowledge. It must not be knowledge from hearsay, or from possibilities or probabilities. It must be first hand knowledge...of all the facts necessary to know that the alleged felony has been committed."

When this description of the knowledge needed is applied to the drug counseling services being provided, it would appear unlikely that a teacher or guidance counselor would ever gain the complete knowledge which is required to bring him within the ambit of N.J.S. 2A:97-2. Conceivably, however, a student might confide in a teacher or counselor to the extent that he would show him the marijuana or hashish he had in his possession. This I suspect would be a rare occasion. In any event, the action taken by the teacher or counselor under these circumstances becomes extremely critical because it may involve him in violations of other statutes relating to aiding and abetting which will be touched on later.

With regard to the wording "conceals and does not...disclose," the law is somewhat more settled. The leading federal case, Neal v. United States, 102 F2d 643 (1939), which interprets this wording, sets out the four necessary elements

of misprision under the Federal statute, to wit: a. commission of the specified crime; b. full knowledge of the commission of the crime; c. failure to disclose the crime; d. some positive act of concealment.

The positive act of concealment is, of course, of paramount importance. The first two elements are part of the requisite "knowledge" test alluded to above. The third element, failure to disclose the crime, would necessarily be encompassed within the act of concealment. Therefore, unless an educator takes some positive step to actually hide or conceal the crime which has been committed, it cannot be said that he has violated the misprision statute. The holding in the Neal case was subsequently upheld in Lancy v. United States, 356 F2d 407 (1966).

If school board attorneys, in view of the foregoing, are to advise educators that they need not seek out and report to the law enforcement authorities information obtained from drug counseling programs, should educators correspondingly thumb their noses at the law enforcement authorities? Of course not. That type of action can only tend to invite disastrous results. I am certain you will find, if you have not already been exposed to problems of drug abuse, that any program of this type which expects to succeed should be thoroughly promulgated. There should be direct communication with the local police. The police should be apprised of the type of program which is functioning in the school district, and most certainly they should be kept abreast of the types of counseling services which are being offered the students.

The community as a whole should also know what the school system has to offer in this area and what in fact is being offered.

Only in this way can a board expect cooperation from the community. Ten or fifteen years ago a student with a drug problem was a rarity, and in no event was the school teacher expected to become personally involved with the problem. It was a medical problem which the student and his parents were expected to work out with the family physician. That is not the case today. Our legislature has now mandated that school personnel become involved with these problems and since that is so, the public has a right to know how our schools are implementing the legislation dealing with drug abuse. Only after the local police and public are informed will the cry of "no communication" cease.

Earlier mention was made that school personnel might, in the administering of a drug abuse program, possibly involve themselves in violations of statutes dealing with aiding and abetting. A general prescription cannot be written which would warrant that, if followed, it would guarantee that the actions of school personnel involved in programs of this type are legally justifiable. The facts which may develop in various drug counseling programs cannot be anticipated. However, school personnel should be apprised of the statutory provisions. They must realize that although they need not necessarily seek out and report to law enforcement officials information obtained in a drug counseling program, nevertheless, the schools cannot be permitted to develop into drug using sanctuaries.

Principals, along with every other member of the staff involved in a drug counseling program, should know that N.J.S. 2A:85-2 provides that any person who "...knowingly or willfully aids or assists any person who has committed... a high misdemeanor...is guilty of a misdemeanor." They should also be informed that N.J.S. 2A:85-14 provides, anyone who "aids, abets, counsels, commands, induces or procures another to commit a crime is punishable as a principal."

Further, they should know that anyone "who induces or persuades any other person to use any narcotic drug unlawfully, or aids or contributes to such use of any narcotic drug by another person, or contributes to the addiction of any other person..." is guilty of a misdemeanor as provided in N.J.S. 2A:108-9.

This legislation applies to everyone and school personnel should not be led to believe they can hide behind a drug counseling program. The aforementioned legislation, however, in my opinion, should not hinder, interfere or in any way cause concern to school personnel involved in an effectively functioning drug counseling program. Any educator professionally trained who acts with discretion and common sense should be able to counsel students regarding drugs without violating the law.

Educators who have become involved in this area, but remain apprehensive, should take advantage of the additional programs which are being made available through the State Department of Education. Presently a supplemental drug abuse program, partially funded with federal money, is being conducted.

This program consists of a team of experts whose aims are similar to those mentioned earlier when the mandated drug abuse program was discussed. In addition, these experts are attempting to develop a drug abuse unit of education for each grade level. This program is strictly voluntary. Nevertheless, participation has been good. School personnel who do attend the workshops are permitted released time from their regularly scheduled school duties.

Results from these drug abuse training programs cannot be easily or readily measured. It is interesting to note, however, that in certain areas of the state, non-residential drug treatment centers for school age children have begun to appear, and these centers have been reporting remarkable successes. Perhaps more

of these centers will begin to appear after our statewide drug abuse program has had a little more time to function. Hopefully, by this time next year each county might be able to boast of its own non-residential treatment center. Certainly this would be the culmination of a truly effectively run statewide program -- trained and dedicated personnel in our schools who can identify the students needing help and then referral to a treatment center where therapy can be had on a non-residential basis whereby the student returns home each day following the therapy.

There can be no question about the State of New Jersey being a leader in the area of combatting drug abuse. I have been informed that the United States Department of Health, Education and Welfare is directing other states to follow the lead of New Jersey and to adopt legislation similar to ours. Information of this nature is certainly refreshing.

Whether New Jersey remains a leader, however, in this most important area will depend to a great extent on each local board and the constituents it represents.

New Jersey has the needed legislation, the expertise and the programs available through the State Department of Education. What is needed now is total committment by each local board, the local law enforcement authorities and the community as a whole.

COMMENTS

HAROLD FEINBERG, ESQ.

Harold Feinberg is a graduate of New York University and Rutgers University. Engaged in the general practice of law in Point Pleasant Beach, New Jersey, Mr. Feinberg serves as counsel to numerous municipalities and boards of education. A past president of the New Jersey Institute of Municipal Attorneys and of the Ocean County Bar Association, he serves as a trustee of the New Jersey Association of School Attorneys.

In my opinion, Pete Kalac has delivered an excellent paper. He highlights the problems facing the schools. Laymen always ask municipal and school attorneys for a set of guidelines to protect them in cases where they take action. I may outline, on occasion, certain rules to be followed, but my repetitious advice is to "use the gray matter you were endowed with" and to "recall that you claim to be a professional with knowledge" and above all, in certain situations, "you must stick your neck out." All too often, the teacher wants protection for his action without thought beforehand if he is doing the right thing.

The education of all teachers to recognize drugs and drug symptoms is laudable. However, we are asking the impossible. There should be a specialized drug unit within the school (or the school system, if it is too small) available to students for advice and help. The same should have a knowledgeable physician. The unit should also include a trained (in drug problems) police officer, who is understanding of children and their problems. Above all, I would add thereto a psychiatrist and people trained in family relations to eradicate the initial problems that lead to drugs. We have a social problem that requires confidentiality and its cure lies with trust and communication -- not a fear of misprision or possession statutes.

Counseling of the students -- and earning their respect and cooperation -- will lead to a faster solution than arrest and trial and conviction. Youth today claims to be individual -- yet glance at their clothes, actions and mores. You will see that they all suffer from a terrible urge to conform and be accepted. Thus, they take the bad habits with the good.

Finally, teachers should not fear, at least in drug cases, the effects of a search and seizure. No matter whan anyone says -- the teacher acts in place of the parent and, while the child is in school, has the parent's rights, duties and responsibilities. He must also be as understanding as a parent is. As the New York Court of Appeals said in the first case of People v. Overton, 20 N.Y. 2d (1967) in upholding a search and seizure of drugs in a school locker: "Indeed it is doubtful if a school would be properly discharging its duty of supervision over the students, if it failed to retain control over the lockers. Not only have the school authorities a right to inspect but this right becomes a duty when suspicion arises that something of an illegal nature may be secreted there."

Two years later, the Supreme Court of Kansas in the matter of State v. Stein, 203 Kan. 638 (1969) ruled it to be a proper function of school authorities (whom the court also considered "in loco parentis") to inspect lockers "and to prevent their use in illicit ways of for illegal purposes."

I represent a high school that had many bomb scare calls. The authorities could not accuse each student -- but I permitted police to enter and search all rooms and lockers. We have in mind the good and welfare of all students -- not merely the individual in those situations. Would parents permit a child to take

drugs with that knowledge -- or carry a loaded weapon? How about the parent who would "stop and frisk" the child as the latter prepares to leave home? Does anyone opt for a civil rights action against the parent? Of interest would be the case of People v. Taggart, 20 N.Y. 335 (1967), where the police received an anonymous telephone call that Taggart was on the corner in the midst of school children, and the New York Court of Appeals upheld a search under that state's stop and frisk statute. The U.S. Supreme Court relied on the experience of the police officer, who without a warrant, "frisked and searched" and found a revolver upon one Terry, who was observed with two other men, alternately walking back and forth in front of a jewelry store and peering in, each time they passed. Terry v. Ohio, 392 U.S. 1 (1968). As with the police in the last cited case, teachers must make judgments on their experience and determine, if they wish to examine a child without a search warrant, that they have reasonable grounds to suspect criminal behavior and immediate action is required. I agree with Peter that "what is needed now is total commitment by each local board (and I add its professional staff), the local law enforcement authorities and the community as a whole" without fear of reprisal.

COMMENTS

JUDGE JERRY J. MASSELL

Jerry J. Massell is a graduate of Boston College and the American University School of Law. Engaged in the general practice of law in Red Bank, New Jersey, Mr. Massell also serves as Municipal Court Judge for Middletown Township. He is a member of the American Bar Association, the New Jersey State Bar Association, the Monmouth County Bar Association and the American Judicature Society.

From my point of view, as a municipal judge and a practicing attorney, I believe that the establishment of summer workshops and training programs in order to develop a curriculum and a recommended drug education unit under 18A:4-28.4, et seq., is for limited purposes only, and that is as a means of providing a factual presentation of the problems of drug abuse for student consumption.

I do not believe that the legislative intent was that the educators were also required to provide counseling for individual students with respect to his drug problems.

If we proceed from this premise, we would not have to consider the question of concealment of a high misdemeanor on the part of the teacher, the problem raised by Peter Kalac. (A misdemeanor under 2A:97-2). The teacher, in my opinion, should be instructed not to advise or counsel the student concerning his personal drug problems, but should recommend to the student to seek advice from a licensed physician, psychologist or clergyman, all of whom have a privilege against disclosing information of a confidential nature. (N.J. Rules of Evidence, 26A-1, 2 and 29).

If a particular school board feels it should go further than informing and instructing the student, then it should, as suggested by Harold Feinberg, form a specialized drug unit made up of a physician and psychiatrist or psychologist and perhaps a clergyman, to provide advice and help for individual students and their particular drug problems.

If this policy is adopted, no question would then arise as to whether the teacher is violating 2A:97-2 dealing with the crime of failing to disclose a crime. This statute is going to apply to teachers and they should be advised of it.

Besides the legal obligation of reporting a crime, what benefit is derived by reporting to law enforcement authorities information obtained concerning drug abuse in the schools? I believe school authorities, parents, the police and the community have one goal in mind in this area, i.e., the control and abolition of drug abuse. One of the most important means of control of this problem lies with the apprehension of the pushers and inducers. If we are to stem this tide, police enforcement along these lines is a necessity.

I am not going to bore you with statistics, but I happened to come across a report from the State Law Enforcement Program Assistance Agency (SLEPA) dated June 23, 1969. In 1968, the total number of those under 18 years of age, arrested for alleged violation of narcotic and drug laws was 1,765; over 18, 6,131. This was an increase of 96.1% and 47.9% respectively, over 1967 arrests. I do not have current figures, but I doubt it if the trend is downwards.

I believe the set of guidelines for teachers, similar to that instituted in New York, which Pete alluded to, should be adopted in New Jersey. This will eliminate some of the fears teachers may have in taking affirmative action in the control of dangerous drugs in our schools.

II

The Law of Non-Tenure Teacher Dismissals -- A Challenge for Change

JOHN S. FIELDS, ESQ.

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INTRODUCTION

During the last five years the wave of militancy which has been sweeping across this land has left an indelible mark on American education, as well as on almost every other basic institution. The ultimate effect of this wave has not yet been fully perceived since we are still in the midst of its action-reaction syndrome. Clearly, however, previously unquestioned concepts have changed and are changing with a resultant erosion of certainty and a new era of intellectual challenge for the educator, his board members and their attorneys.

Militancy in education in this new era received added impetus from the adoption of legislation compelling boards to engage in collective negotiations with public school employees.[1] Initial gains won by teachers both in economic benefits and in greater involvement in the formulation of educational policy have fed the movement and encouraged its continuance. Each year the New Jersey Education Association's master contract proposal urges local affiliates to seek the surrender of board rights and prerogatives.

Many of you have undoubtedly been faced at the negotiating table with a proposal referred to as the "Fair Dismissal Procedure" Article. This proposal, a basic restatement of an N.J.E.A. legislative proposal,[2] would effectively confer upon all teachers the tenure benefits presently available by law only to those who have successfully completed the prescribed probationary period.[3]

The dismissal of probationary teachers, as well as their non-retention after a stipulated term, had always been a relatively routine administrative matter. Generally, board counsel was not even consulted with respect to the same. Such is no longer the case. A three-pronged attack has been launched by teacher organizations to obviate the historical distinctions between probationary and tenure teachers, namely: (1) at the negotiating table, (2) in the legislature and (3) in the courts.

In this presentation, I would like to discuss with you the judicial developments in this area and hopefully thereby broaden our awareness of the total scope and intensity of the contemporary problems in non-tenure dismissal cases.

EXISTING NEW JERSEY LAW

The legislature in N.J.S.A. 18A:28-1 enacted exhaustive regulations pertaining to the acquisition of tenure in educational positions. Tenure, as such, is a legal status conferred by legislative action. To the extent that the legislature has conferred the tenure status and concomitant benefits upon teachers who have fulfilled the statutory conditions for the same, it has by clear implication excluded all other teachers therefrom until they have fulfilled their probationary conditions.

There have been innumerable decisions by the Commissioner of Education holding that the employment of a teacher who has not acquired tenure status lies within the discretionary authority vested in local boards of education.[4] As such, the same decisions have similarly been cited for the proposition that when a board decides to terminate or not to renew the contract of a probationary teacher it may do so without presenting him with a statement of the reasons therefor or affording him an opportunity to be heard with respect thereto.[5]

The decisions of the Commissioner emphasize the legislative intent to distinguish between probationary and tenure teachers, the administrative burden which a contrary rule would place upon local boards and the availability of adequate remedies for flagrantly illegal board action.[6] Thus, in Gibson v. Board of Education of Collingswood, supra, note four, it was observed that in the event of a contrary interpretation "the distinction between tenure and probationary status would be without a difference." Similarly, in Ruch v. Greater Egg Harbor Regional Board of Education, supra, note four, the Commissioner indicated that the requirement of providing a statement of reasons and a hearing "would vitiate the discretionary authority of the board of education and would create insurmountable problems in the administration of the schools."

The same result was affirmed by the New Jersey Supreme Court in 1962 in the case of Zimmerman v. Board of Education of Newark, 38 N.J. 65, 183 A2d 25 (1962). This opinion contains an extensive review of the statutory authority of local boards and concluded that a board's right to discharge a teacher without a statement of reasons or a hearing was without limitation, except as provided in "the Constitutions of the United States and this State, by the Teachers' Tenure Act, and by other statutory provisions such as the law

against discrimination." In the language of the Court: "Except as provided by the above limitations or by contract, the Board has the right to employ and discharge its employees as it sees fit."

It is worthwhile to review the Zimmerman opinion whenever one comes to grips with a discharge case. The majority touched upon most of the philosophical arguments being restated in contemporary decisions. It is noted, for example,"that boards have a greater duty than to merely hire instructors,"[7] namely to make permanent appointments to specific positions "only if teachers are found suitable...after a qualifying period." The court further acknowledged the difficulty of evaluating whether or not a given teacher is suitable to fill a specific position in each situation with which a board may be confronted, quoting extensively from a prior opinion in the case of Cammarata v. Essex County Park Commission, 26 N.J. 404, 140 A2d, 397 (1958) as follows:

> "It is difficult to evaluate the character, industry, personality and responsibility of an applicant from his performance on a written examination...the crucial test of his fitness is how he fares on the job from day to day...Many intangible qualities must be taken into account..."[8]

There was a recent renewal of this challenge by a non-tenure teacher for a statement of the reasons for her discharge and a hearing thereon in the case of Donaldson v. Board of Education of the City of North Wildwood, N.J. Super (App. Div. 1971), not yet reported, decided on June 22, 1971.[9] The Appellate Division, quoting extensively from the Zimmerman opinion, affirmed the decision of the State Board of Education denying a probationary teacher the right to a statement of reasons why her contract was not renewed and the right to be heard on the issue before her local board. Judge Kilkenny concluded his opinion with the following language:

"Unless and until our Legislature or Supreme Court adopts a different public policy, we feel bound by Zimmerman, supra and the long standing interpretation of our Education Laws by the State Department of Education to conclude that non-tenure teachers have no legal right to a renewal of a teaching contract; or to a statement or explanation of the reasons for non-renewal, or to a hearing as to the reasonableness of reasons for non-renewal absent a showing of unconstitutional discrimination."

REASONS FOR CONCERN

With this long line of precendents recently reaffirmed by our Appellate Division just a few months ago one might be tempted to ask: Why are we discussing this topic today? Let me suggest several reasons to you.

Constitutional Allegations:

First of all, Zimmerman specifically stated that a board's right to discharge or not retain a probationary teacher was subject to constitutional limitations, a condition specifically preserved by Donaldson as well. There is a long line of decisions sustaining the right of a teacher, regardless of tenure status to seek redress for disciplinary action or termination of employment in derogation of that teacher's constitutionally protected rights.

The federal courts have repeatedly stated that teachers are not to be treated as "second class citizens" in regard to their constitutional rights.[10] As early as 1956, the United States Supreme Court voided a New York Statute authorizing the dismissal of certain educators for exercising their right against self incrimination.[11] In Shelton v. Tucker[12] decided in 1960, the court invalidated a mandatory disclosure statute where compliance with the same was a condition of one's employment as a teacher, holding that the failure to re-employ cannot rest "on constitutionally impermissible grounds."

The most common contemporary vehicles utilized by teachers in this regard are the provisions of 42 U.S.A. 1983[13] and 28 U.S.C. 1343,[14] both of which confer upon federal district courts jurisdiction to entertain suits at law or in equity, for money damages or other appropriate relief alleging state or governmental action resulting in the deprivation of any right, privilege or immunity secured by the Constitution of other applicable laws.

One of the earliest cases of this type involving a non-tenure teacher was that of Bomar v. Keyes,[15] decided by the Court of Appeals for the Second Circuit in 1947, the opinion in which was written by Judge Learned Hand. In this case a teacher allegedly discharged for having accepted a call to jury duty contrary to the wishes of the school administration brought an action under 42 U.S.C. 1983 (Civil Rights Act of 1871). The appellate court reversed a summary judgment in favor of the board of education and remanded the case for trial, holding that the teacher could not be discharged in violation of her constitutional right.[16] The actual cause for discharge was to be determined by the trial court.

Since that time there have been a multitude of federal decisions involving cases in which non-tenure teachers have alleged that they were discharged or not retained for various unconstitutional reasons, and received full trial hearings. To sustain a motion to dismiss for failure to state a claim under the Federal Rules of Civil Procedure it must appear "beyond doubt" that the plaintiff "can prove no set of facts in support of his claim" for relief.[17] Any attorney with a minimum amount of basic intelligence and diligence can draft a pleading to survive this test. Thereafter, the complaining teacher and her attorney have available the very liberal civil discovery rules under which to compel the board to reveal the reasons for discharge or non-retention

and its supporting data. Although the ultimate burden or persuasion in such cases remains with the complaining teacher, the inability of the board to provide cogent reasons for its action and adequate supporting evidence therefor will simply reaffirm the validity of the plaintiff's allegations.

Since boards are subject to such litigation at all times, it is imperative that they be aware of the necessity for maintaining adequate personnel files with reasonable justification for their action. Failure to do so can be both embarrassing and costly.[18]

The cases generally have sustained and held for trial actions by non-tenure teachers alleging discharge by reason of racial discimination,[19] union activity,[20] political activity,[21] and certain "pure speech" activities.[22] Conversely, there are a few interesting cases upholding dismissals in the area of "pure speech" allegations on the theory that where speech disrupts the educational process it loses its cloak of constitutional protection.[23] I would also commend to one involved in such litigation the opinion in the case of Klein v. Joint School District,[24] a recent decision in the Wisconsin district, in which it is suggested that upon the presentation of such an allegation the board assumes an affirmative burden of going forward with evidence to identify with particularity both the reasons for its dismissal and the factual basis for each.

With the federal courts providing an open forum for such challenges by non-tenure teachers who are dismissed or not re-hired, neither boards nor their attorneys can afford to remain confidently aloof from the dismissal and non-retention practices in their districts.

Certification of Donaldson Case:

A second reason for concern which I suggest to you is the fact that the New Jersey Supreme Court recently granted the plaintiff Donaldson's petition for certification and will in the near future be reviewing that case and its attendant issues relating to the rights of non-tenure teachers. While the mere grant of certification is not itself indicative of what the court may eventually decide, every review of a traditional precept of the law exposes that precept to the winds of change. On this issue a storm may well be brewing.

The Monks Case:

Thirdly, I am concerned about the possible impact upon the issues which we are discussing of the case of Monks v. New Jersey State Parole Board,[25] decided by the Supreme Court of New Jersey on May 10, 1971. Mr. Monks had been an involuntary resident of New Jersey penal facilities since 1957 and had twice sought to be paroled without success. After receiving his latest denial and notice that his case would be reviewed again in two years, he requested from the Parole Board a statement of the reasons for the denial of his application so that he might be adequately prepared to meet them on his next review. The Parole Board declined and litigation ensued in which Monks sought to compel disclosure of said reasons.

Mr. Monks met with little initial success, but the State Supreme Court reversed its trial and appellate decisions, held that Monks was entitled to the requested statement and ordered the Parole Board to formulate a new administrative rule embodying the principles of this decision.

It should be noted that the court did not indicate that Monks had any federal constitutional right to the statement of reasons which he sought. The court, rather, based its decision on its inherent historical power to supervise administrative agencies and inferior governmental tribunals and its devotion to the basic principle of fairness. Justice Jacobs, speaking for a unanimous Court, observed that:

> "The need for fairness is as urgent in the parole process as elsewhere in the law and it is evident to us that, as a general matter, the furnishing of reasons for denial would be the much fairer course...So here, fairness and rightness clearly dictate the granting of the prisoner's request for a statement of reasons. That course as a general matter would serve the acknowledged interests of procedural fairness and would also serve as a suitable and significant discipline on the Board's exercise of its wide powers."

The analogy of the Monks case and the applicability of the above language to the demands of probationary teachers for a statement of reasons for termination and a hearing thereon are highlighted by the court's discussion, at some length, in its opinion of the case of Drown v. Portsmouth School District.[26] The Drown case is one of a series of recent federal cases dealing with the issue of whether or not probationary teachers have an independent federal constitutional right to be free from arbitrary termination or non-retention with attendant rights to a statement of reasons and/or a hearing thereon. The impact of Drown and its companions will be discussed hereafter; however, the mere citation of a case from this area and one whose holding represents a departure from existing New Jersey law is in itself significant[27] and may well be a harbinger of things to come.[28]

Views In the Circuits - A Conflict:

Finally, I submit to you that a series of recent federal decisions, including Drown, have created serious concern and some turmoil with respect

to the rights -- or lack thereof -- of non-tenure teachers. The rising controversy among the federal circuits in this regard is over the existence or non-existence of an independent constitutional right of probationary teachers to have, in the words of one jurist, "the personal liberty to pursue one's employment without arbitrary vilification and reckless exclusion by the state."[29] With such a right, if it exists, is the ancillary right to be notified of the reasons for termination or non-retention and the opportunity to be heard with respect thereto.

Obviously, if non-tenure teachers possess such rights as a matter of constitutional law, the existing New Jersey rules expressed in both Zimmerman and Donaldson would fall. As I view these cases they generally seem to settle into three patterns or classes, and for purposes of convenience, I would like to discuss each separately.

1. The Strict Interpretation:

For those who might be disturbed by any fear of the erosion of certainty which Zimmerman long provided there is solace to be found at least in some federal circuits.[30] Cases adopting this "strict" approach hold that in the absence of contract right or statutory provision a probationary teacher had no right, constitutional or otherwise, to a statement of reasons for discharge or non-retention or to a hearing thereon. The best exposition of this viewpoint is found in Freeman v. Gould, 405 F 2d 1153 (C.A. 8th 1969), cert denied 396 U.S. 843 (1969).

The majority of the court in the Freeman case recognized the continuing right of non-tenure teachers to seek redress in the federal courts if their termination resulted from the infringement of a specific constitutional right

(e.g. union activity, racial discrimination as previously discussed), but otherwise found that probationary teachers had no right under the due process clause to any administrative hearing or judicial review on a claim of arbitrary action. To hold otherwise, noted the majority, would create a system of instant tenure with both a tremendous administrative burden and an unfair burden on local boards of having to prove "just cause" for any and all terminations.

Of similar import was an earlier decision of the fourth circuit in the case of Parker v. Board of Education of Prince George's County.[31] The court here narrowly construed the issue as turning entirely on the language of the teacher's contract, and found that under a thirty day termination clause therein the teacher could be dismissed without explanation or hearing.

In Jones v. Hopper, 410 F2d 1323 (C.A. 10th 1969) the court went even a little further than did Freeman, on which it purported to rely. Here a non-tenure teacher who was not rehired filed suit under 42 U.S.C. 1983 alleging, among other things, that she was discharged because of certain speech activities, publication of unpopular views and her religious beliefs, in derogation of her first amendment rights. The court upheld a dismissal for failure to state a claim upon which relief could be granted on the grounds that the teacher had no enforceable right to continued employment and could therefore be summarily discharged.[32] A similar misinterpretation of Freeman was made in Wilson v. Pleasant Hill School District[33] where a federal district court judge granted a motion to dismiss despite the plaintiff's allegation that he was discharged because of his union activity. Likewise, in Shirk v. Thomas, 315 F. Supp. 1124 (S.D. Ill 1970) a district judge dismissed a suit for money damages holding that a probationary teacher has no right whatsoever to public employment.

Cases advancing this "strict" point of view place great reliance on the decisions of the United States Supreme Court in Vitarelli v. Seaton[34] and Cafeteria and Restaurant Workers Union v. McElroy.[35] Both of these cases cite the principle that public employment is a privilege and not a right and both upheld the government's right to summarily dismiss civilian employees, although the latter case is clouded by the fact that the dismissal was for security reasons.[36] These cases contrast significantly with Greene v. McElroy, 360 U.S. 474 (1959), in which the same court held that the right to "hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the fifth amendment." One wonders how long this traditional distinction can survive.[37]

Perhaps the most cogent of the opinions supporting the "strict" interpretation approach is that of the sixth circuit in the case of Orr v. Trinter.[38] This decision is interesting because the opinion of the district court had followed the "liberal" trend and held that a local boards' failure to provide a probationary teacher whose contract was not renewed with the reasons for non-renewal an opportunity to be heard thereon was violative of "his substantial rights under the Fourteenth Amendment due process clause." On appeal that decision was reversed. In doing so, however, the court was careful to distinguish cases in which the termination or non-renewal were alleged to have been grounded upon the violation of specific constitutional rights.[39] It acknowledged that such complaints would state a claim for which federal relief could be granted.

However, the court of appeals clearly rejected the theory of the trial court opinion. It noted that:

> "The Fourteenth Amendment only protects against the State depriving one of life, liberty or property without due process of law. It has been held repeatedly and consistently that government employ is not property...We are unable to perceive how it could be held to be liberty. Clearly it is not life."

2. The Liberal Interpretation:

In complete opposition to the Orr court are a series of decisions in support of the asserted constitutional right of non-tenure teachers to be advised of the reasons for their termination and to have an opportunity to be heard thereon. These so-called "liberal" opinions find their origin in an expansive reading of the due process clause so as to protect every individual against arbitrary state action. Impetus for this approach was initially found in those decisions of the United States Supreme Court extending the due process benefits to attorneys and other licensed professionals.[40] While those decisions might be distinguished on the grounds that they apply only to the general right to practice a licensed profession and not to a specific employment relationship,[41] the validity of such a distinction is questionable.

Likewise, a teacher might well have certain substantial and continuing interests other than that in retaining a specific job which would justify due process protection, namely, his professional reputation and ability to effectively pursue a teaching career. Such interests were of concern to the second circuit in Birnbaum v. Trussel, 371 F 2d 672 (C.A. 2nd 1966). There a physician was discharged from the employ of a municipal hospital without notice or hearing and sought judicial relief. The court, in granting the same, observed that while government employment is a "privilege" and not a property right, the presence of a "substantial interest" other than state employment would require the state to afford the employee being discharged

complete due process protection. Is the interest of a physician in his professional reputation and ability to effectively pursue his career so substantially different from that of an educator to warrant more preferential consideration in the availability of due process protection?

Moreover, in Cafeteria and Restaurant Worker's Union v. McElroy, supra often cited in support of a public employer's right of summary discharge, the majority spoke extensively on the concept of "balancing the interests" of employer and employee as a means of determining whether notice and hearing should be required of the employer. Such balancing could well invoke a different result in an examination of the burdens and interests of boards of education and probationary teachers.

It was with this background that Judge James Doyle sitting in a federal district court in Wisconsin heard and decided the claim of a non-tenure college professor that he had a right to know why his contract was not being renewed by the state university and to be heard on the issue.[42] The district court ruled that the due process clause required that Roth be provided with a statement of the reasons for his non-retention. It thus recognized the right of a probationary teacher to be free from arbitrary discharge or non-retention by a public employer. That decision was recently affirmed by the seventh circuit in a divided opinion.[43]

The majority opinion of the court of appeals applied the "balancing of the interests" test of Cafeteria and Restaurant Workers Union v. McElroy and concluded that the "substantial adverse effect" that non-retention would have on the plaintiff's career outweighed the state's interest in having unrestricted freedom to prune its faculties. Such a rule would likewise,

in the words of the court, serve "the public interest in not only promoting fairness but in encouraging an academic atmosphere free from the threat of arbitrary treatment."

Of almost equal significance is that under the Roth rationale the employer at the required hearing has the initial burden of justifying its action, although in order to justify the same it need not establish the equivalent of "just cause" in a tenure case. The exact burden of the employer is not articulated other than to say that the standard of justification is to be "considerably less severe than the standard of 'cause' as used in a tenure case."

The same principles enunciated in Roth were applied in the case of Gouge v. Joint School District #1[44] to a case in which a non-tenure teacher was terminated for alleged teaching inefficiencies.

The Roth case has won acclaim from many constitutional scholars and has attracted considerable attention. Whether its basic philosophy will win acceptance as constitutional doctrine by the United States Supreme Court remains to be seen.

3. The Middle Ground:

Situate at various points between these two extremes are the recently expressed views of the first and fifth circuits which are interesting but not helpful as far as the ultimate resolution of the problem is concerned. Consider, for example the case of Ferguson v. Thomas,[45] the facts of which are as confusing as the court's decision. Here a college professor employed for some years but without any statutory tenure was summarily dismissed. He sought relief in the federal courts alleging that he was terminated for a

vast variety of improper reasons without explanation or hearing. The court held that the plaintiff had an "expectancy of re-employment" and was therefore entitled to receive a statement of the reasons for his termination and a hearing thereon.[46] The court went on to say that one must strike a balance between the plaintiff's exercise of his constitutional rights and the employer's obligation to run an effective educational institution, and in the end the plaintiff's use of his rights of free speech and freedom of association was held to have destroyed his usefulness as an instructor in this institution, thus justifying his discharge. Ferguson means all things to all people. It represents an example of the futility of attempting to cater in some degree to all of the competing interests in this area.

The same circuit seems otherwise to have developed a consistent if somewhat specious rule of thumb. In Sinderman v. Perry, 430 F 2d 852 (C.A. 5th 1970), cert. granted 6/14/71 as per 39 Law Week 2548, the court held that where a non-tenure teacher alleges termination for reasons which would contravene a specific constitutional right, the board must provide him with a statement of reasons for his termination and a hearing. However, if there is no such allegation, no statement or hearing is required.

The principle was reaffirmed in two more recent decisions in the same circuit, Lucas v. Chapman,[47] and Thaw v. Board of Public Instruction of Dade County.[48] Neither case contained any allegation of the abridgement of a specific First or Fifth Amendment right. In Lucas the court used such absence to deny a hearing since "the only matter in issue is a difference in view over a school board's exercise of discretion and judgment concerning matters non-constitutional in nature."

Such decisions really beg the question. If a teacher alleges non-retention by reason of racial discrimination, union activity and the like, almost every decision has held that he is entitled to a trial thereon in a federal district court.[49] Administrative hearings at this point are of little use. The fifth circuit avoids the issue of whether such teachers have a constitutional right to be free from arbitrary termination itself, choosing to generally categorize such claims as involving "non-constitutional issues." This approach offers little if any help.

A somewhat more realistic, though far from definitive, resolution was proposed by the first circuit in the case of Drown v. Portsmouth School District.[50] The court here also utilized the "balancing of the interests" tests and reached the following unique result. All non-tenure teachers who are discharged or not retained must be furnished with a statement of the reasons for such action and be given access to any evaluative material in the possession of the board; however, after making such disclosure, the board need not grant any hearing with respect to its action. The rationale for this approach is that if the statement and evaluative material evidences termination for constitutionally impermissible reasons the teacher has an adequate remedy through the federal court system. It also avoids the basic issue of whether the teacher has the constitutional right to be free from arbitrary or unreasonable termination in and of itself.

Drown offers no remedy, for example, to the probationary teacher discharged for certain alleged acts of misconduct which might never have occurred. Under its principles it grants to teachers so situate the right to know that they were discharged arbitrarily but not the opportunity to demonstrate it.

However, that gap could be filled assuming that the teacher could, in this state, appeal his dismissal to the Commissioner, bearing the burden of proof but still preserving his right to be heard, with judicial review of the administrative determination under the existing appellate procedures. The opinion of the Commissioner in Ruch v. Greater Egg Harbor Regional Board of Education, 1968, S.L.D. 7, would seem to provide a basis for such action since that opinion indicates the availability of that forum if a teacher can establish a prima facie case of illegal activity. The key is, of course, the scope and meaning of the word "illegal" as used in that instance.

These "middle ground" cases in themselves offer no solution to the basic problem, although Drown with some supplemental procedure to alleviate its one blindspot may be a practical medium which would find general acceptance. It will I am sure, have a significant role in the deliberations of the New Jersey Supreme Court in the Donaldson case.

CONCLUSION

The definitive opinion on the rights of non-tenure teachers remains to be written. It may come in Donaldson or perhaps in an ultimate review by the United States Supreme Court in its review of Roth or Sinderman. The "balancing of the interests" test as we have seen can lead to as many diverse results as there are applications of it. An advocate for either side of the controversy can marshal sound educational and administrative arguments for each position and some legal precedent to support its validity. In the interim, however, while no solutions are at hand, I hope that there is an acute awareness of the problems in this dynamic area and of the danger of blind reliance on the theories of the past.

I suggest to you that pending further judicial clarification boards in this state should refrain from furnishing to non-tenure teachers statements of reasons for termination or non-retention, while being carefully prepared to present such reasons and to document the same in the event that they are required to do so. I suggest to you that local districts should have administrative procedures for the evaluation of probationary personnel and sufficient supervision of its administrators to be sure that such are being followed. I suggest to you that some change, some movement toward liberality, will be shortly forthcoming expanding the rights of non-tenure teachers beyond their present status under New Jersey law. I hope that our discussion today will assist you to some degree in meeting the challenge of that change.

1. Ch. 303 P.L. 1969; N.J.S.A. 34:13A-1 et seq.

2. Assembly bill 238 (1969 session)

3. See N.J.S.A. 18A:11-1; 18A:27-4 and 18A:28-1. The only significant distinction is that the non-tenure teacher would receive a hearing before the board, while in the case of a tenure teacher the hearing would be conducted initially by the commissioner himself. (N.J.S.A. 18A:6-11 and 18A:6-16).

4. Amorosa v. Bayonne Board of Education, 1966 S.L.D. 214; Ruch v. Greater Egg Harbor Regional Board of Education, 1968 S.L.D. 7; Schaffer v. Fair Lawn Board of Education, 1968 S.L.D. 213; Ruggiero v. Greater Egg Harbor Regional Board of Education, decided March 17, 1970; Gibson v. Board of Education of Collingswood, decided March 26, 1970; Burstein v. Board of Education of Englewood Cliffs, decided during 1970; Wharton Teacher's Association v. Board of Education of the Borough of Wharton, decided during 1971.

5. See note 4, supra; See also Taylor v. Paterson State College, 1966 S.L.D. 33; Meyer v. Board of Education of Sayerville, decided July 16, 1970. Interestingly, the Commissioner in Meyer discusses necessity for a hearing by the local board where a probationary teacher alleges non-retention as a result of union activities.

6. See Ruch v. Greater Egg Harbor Regional Board of Education, supra note 4; cf Parker v. Board of Education of Prince George's County, 237 F. Supp. 222 (C.A. 4th 1966), cert. denied 382 U.S. 1030, (1966).

7. This classification was to have later relevance in the distinction drawn by some federal courts between teachers and so-called "licensed professionals" such as attorneys and physicians.

8. But see the concurring opinion of Chief Justice Weintraub in Zimmerman, particularly as it relates to a case of alleged arbitrary action of the board in failing to rehire a probationary employee.

9. Docket number A-164-70, decided by Judges Kilkenny, Halpern and Lane.

10. Pred. vs. Board of Public Instruction, 415 F2d 851 (C.A. 5th 1969). cf Tinker v. Des Moines Consolidated School District, 393 U.S. 503 (1969).

11. Slochower v. Board of Higher Education of New York 350 U.S. 551 (1956).

12. 364 U.S. 479 (1960).

13. "Every person, who, under color of any statute, ordinance, regulation, custom, or any usage of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

14. See sections (3) and (4) authorizing actions "(3) To redress the deprivation under color of any state law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for the equal rights of citizens or of all persons within the jurisdiction of the United States; and (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

15. 162 F2d 136 (C.A. 2nd 1947).

16. But see Jones v. Hopper, 410 F 2d

17. Conley v. Gibson, 355 U.S. 41 (1957)

18. The standard comprehensive liability insurance policy for boards of education does not cover civil rights actions and supplementary coverage is not yet readily available.

19. Johnson v. Branch, 364 F2d 177 (C.A. 4th 1966); Jackson v. Wheatley School District 430 F2d 1359 (C.A. 5th 1970).

20. Hanover Federation of Teachers v. Hanover Common School District 318 F Supp. 757, (N.D. Indiana 1957); McLaughlin v. Tilendia, 398 F2d 287 (C.A. 2d 1968); Knarr v. Board of School Trustees of Griffin, 317 F Supp (N.D. Indiana 1970); Riciotti v. Warwick School Committee, 319 F Supp 1006 (R.I. 1970).

21. Montgomery v. White, 320 F Supp 303 (E.D. Tex. 1969).

22. Rainey v. Jackson State College, 435 F2d 1031 (C.A. 5th 1970); Pardicci v. Rutland, 316 F Sup 352 (N.D. Ala. 1970); Roberts v. Lake Central School Corp. 317 Fed Supp. 63 (N.D. Indiana 1970); Lucia v. Dugan, 303 F. Supp 112, (1969).

23. Jones v. Battles, 315 F. Supp 601 (D.C. Conn. 1970); Glover v. Daniel 318 F. Supp. 1970 (N.D. Ga. 1969)

24. 310 F. Supp 984 (D.C. Wisc. 1970).

25. _____ N.J. _____ (Docket No. A-98, Sept. term).

26. 435 F2d 1182 (C.A. 1st 1970), cert. denied May 17, 1971

27. The Monks opinion also cited two interesting articles the tone and tenor of which are suggestive of change, at least to the extent of requiring local boards to furnish probationary teachers with written explanations for their dismissal or non-retention, namely: Frakt, "Non-tenure teachers and the Constitution," 18 U. Kan. L. Rev. 27 (1969); Van Alstyne "The Constitutional Rights of Teachers and Professors, "1970 Duke L.J. 841

28. The Appellate Division, prior to deciding Donaldson, supra, asked counsel for supplemental memoranda relating to the import of the Monks decision. There is, however, no reflection of Monks, either expressly or by implication in the Donaldson opinion.

29. Freeman v. Gould, 405 F2d 1153 (C.A. 8th 1969), dissenting opinion of Judge Lay at page 1165.

30. See Freeman, supra, note 29.

31. 237 F. Supp. 222 (D.C. Md. 1965), aff'd 348 F 2d 464 (C.A. 4th 1966), cert. denied 382 U.S. 1030 (1966).

32. There is a vigorous dissent challenging the concept that a board has unlimited power to discharge and citing Pickering v. Board of Education 391 U.S. 563 (1968) to the effect that one does not relinquish his first amendment rights by accepting public employment.

33. _____ F. Supp. _____ (E.D. Mo. 1971), not yet reported. In this case the board voluntarily provided the teacher with the alleged reasons for discharge but declined to afford him an opportunity to be heard thereon.

34. 359 U.S. 535 (1959).

35. 367 U.S. 886 (1961)

36. Four justices dissented from the proposition that the government need only represent that its "security reasons" were valid.

37. In Vitarelli v. Seaton, supra. note 34, the court held that although the plaintiff could have been summarily discharged, once the department voluntarily established discharge procedures it was obliged to scrupulously observe them. In the words of Justice Frankfurter: "He that takes the procedural sword shall perish with that sword." Boards of education should be mindful of this in their negotiations on grievance and termination procedures.

38. 318 Fed Supp. 1041 (S.D. Ohio 1970),reversed _____ F 2d _____(C.A. 6th, 1971) docket number 20721, decided June 16, 1971.

39. Compare with Jones v. Hopper, 410 F. 2d 1323 (C.A. 10th 1970), which makes no such distinction.

40. Schware v. Board of Bar Examiners 353 U.S. 232 (1957); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963)

41. See Freeman v. Gould, supra, note 29.

42. Roth v. Board of Regents of State Colleges, 310 F. Supp. 972 (W.D. Wisc. 1970).

43. _____ F 2d _____ (C.A. 7th 1971), docket number 18490, decided July 1, 1971.

44. 310 F. Supp. 984 (D.C. Wisc. 1970). See also Johnson v. Board of Public Instruction, 241 So 2d 445 (Fla. 1970) holding that a probationary teacher has a cause of action if discharged for "mere personal preference."

45. 430 F 2d 852 (C.A. 5th 1970).

46. The court established some interesting guidelines as to the hearing tribunal -- "a tribunal that possesses some academic expertise and has an apparent impartiality toward the charges."

47. 430 F 2d 935 (C.A. 5th 1970).

48. 432 F 2d 98 (C.A. 5th 1970).

49. Contra, Jones v. Hopper, supra note 39; Jones v. Battles and Glover v. Daniel, supra, note 23.

50. 435 F 2d 1182 (C.A. 1st 1970); cert denied May 17, 1971.

III

Attorney's Fees for Bond Work

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It is a pleasure to be here today for a discussion of what is probably one of the most controversial topics among lawyers today. The subject of Legal Fees on bond issues has been discussed in several reports over the past several years - a report issued by the New Jersey School Boards Association on December 5, 1970, an extensive report in March of this year by the Center for Analysis of Public Issues (a report researched and prepared by Mr. Kolesar), and, most recently, a report last May prepared by the Committee on Municipal Bond Representation of the Local Government Law Section of the New Jersey State Bar Association (a committee of which I was Chairman and which was established by Bill Cox as Chairman of the Local Government Law Section). Even before these reports were prepared, legal fees on bond issues received much unfavorable comment in the public news media and at public meetings of boards of education and municipal governing bodies.

The Committee on Municipal Bond Representation was established in February of 1970 and began an analysis of bonding fees along with an examination of the work performed by local attorneys. The primary source of information was a

survey circulated to members of the Institute of Municipal Attorneys and the New Jersey Association of School Board Attorneys.

This survey revealed that there was an absence of any uniform approach to legal fees on public bond work. There was, for instance, an equal division between those who submitted itemized bills for the work performed and those who did not submit itemized bills. It was almost impossible to draw any meaningful comparison between fees since some attorneys made a practice of including the fee of special bond counsel in their fee, while others had the special bond counsel submit a separate bill. There was also the factor that the work performed by one attorney might not include such items as land acquisition, negotiations with the architect and negotiations with the contractors, while another attorney would include these items in the overall fee.

When our committee report was submitted last May, we recognized it as preliminary, since our approach had been to identify problem areas and make basic suggestions for corrective action. We suggested that a new committee be established by the New Jersey State Bar Association to explore alternative methods of financing public projects and to follow up on the basic suggestions of the original committee report. I will bring you up to date on these recent developments in just a few minutes.

The committee suggestions included the following:

First, that a standardized practice be established of submission of itemized bills for all work performed for public agencies. These bills should clearly set forth the work performed so that the public will be able to relate the fee to the amount of time and effort devoted to the project by the attorney.

Second, billings should not be made on the basis of a flat percentage, but should, instead, be related to the amount of work performed, the time devoted to the project, the expertise of the attorney involved in the work, and the responsibilities accepted by the attorney. These are, of course, the very same factors that enter into the billings for any client and there is no valid reason to apply a different standard to a public agency. While our committee did discuss the possibility of developing a "suggested fee schedule" we found the factor of responsibility very difficult to pin down and we did not pursue this topic further due to the desire to complete our report in time for the Annual Meeting of the New Jersey State Bar Association in May.

Third, that there should be some measure of uniformity throughout the state on the basis on which fees are to be charged for work for public agencies. The nature of the work is not going to change, in the normal situation, simply because a county line is crossed.

Fourth, the practice of citing a "minimum fee schedule" as justification for a particular fee should be discontinued. The term itself is a misnomer since it implies that these fees are binding minimums and that violation of the schedule would constitute unethical conduct. The more appropriate term would be "suggested fee schedule" and it could be used for guidance of both the attorney and the public agency without becoming a crutch for the attorney attempting to silence any questions on his fees.

Fifth, the use of a formal retainer agreement between the attorney and the public agency was encouraged. This practice would eliminate any confusion over what work was to be performed and the basis for the fees to be charged.

Sixth, it was strongly suggested that the practice of local attorneys paying the special bond counsel out of their fee be discontinued so that the public

may distinguish between the fee being paid to local attorneys and the fee paid to special bond counsel. In the same area, it was suggested that the use of Project Fee be used instead of the term "Bonding Fee" since many of the items of work performed by the local attorney are not directly related to the issuance of bonds but are related to the overall project.

Seventh, attorneys performing work for public agencies on a regular basis should be compensated for that work on the basis of the work that is being performed. Attorneys should not submit unrealistically low bills for work being performed on a regular basis, in anticipation of receiving high compensation on bond issues. This practice is deceptive and unfair to the public. Many attorneys have indicated that this practice is followed by public agencies that wish to keep current expense budgets appearing to be lower than they realistically are.

Eighth, a final suggestion that is, perhaps, the key to much of the unfavorable press received by attorneys. Members of the Bar should develop an openness in dealing with the public on matters of public business and should develop their own function and unique ability to serve as a protector of the public interest. While an attorney may be engaged by a public agency, his client is not specifically that agency but is, in fact, the public itself. All too often attorneys refuse to discuss anything, even the weather, with representatives of the press and this leads to an erroneous conclusion that there is something being hidden. There are many areas in which the attorney can clarify, explain and inform without violating any confidential relationship.

With regard to my earlier comments about following up on the initial report and exploring alternative methods of financing some of our public projects, I can advise you that the Board of Trustees of the New Jersey State Bar Association has authorized the formation of a "Public Project Financing Committee" for this

very purpose. It happens that I am the chairman of this new committee, and I want to enlist your aid so that our report will be as thorough and as useful as is possible. We are in the process of drafting a new survey and your cooperation in responding will be crucial to the work of our committee. In addition, we solicit your suggestions and comments on alternative methods of financing public projects and on the basis on which fees should be established -- with particular emphasis on the factor of responsibility. Our committee will be establishing a liaison with the New Jersey School Boards Association, the State Department of Education, the New Jersey State League of Municipalities and the State Department of Community Affairs.

Our committee is not interested in sensationalism or in dramatics for the sake of dramatics. We are interested in serving the public interest and in assisting the vast majority of highly responsible attorneys who represent the public. Your help and cooperation is needed. Your comments and suggestions can be forwarded to our committee in care of the New Jersey State Bar Association at 172 West State Street in Trenton. Thank you.

COMMENTS

WILLIAM MARTIN COX, ESQ.

William M. Cox is a graduate of Syracuse University and the Cornell University School of Law. A partner in the firm of Dolan and Dolan, Newton, New Jersey, Mr. Cox has served as counsel to numerous boards of education and municipalities over a twenty year period, and has himself served as a member of boards of education for over ten years. Chairman of the New Jersey Bar Association Section on Local Government Law, he currently serves as president of the Sussex County Vocational Board of Education.

In reacting to the excellent presentation by Mr. Kearns I must be somewhat prejudiced in view of the fact that at the time that I was chairman of the Local Government Law Section of the State Bar Association, I created the committee which Mr. Kearns has so ably chaired and which resulted in a very excellent report to the Trustees of the State Bar Association.

The report, as you know, has resulted in a creation of a special State Bar Committee which is bringing in other groups such as the School Boards Association of the State, the State League of Municipalities and the Department of Education for the purpose of an in depth examination and study, not only of the matter of bond fees but perhaps other aspects of public financing as well.

The winds of change, as referred to by a previous speaker, this morning, are indeed blowing over our land. Practices which were readily accepted only a few years ago are now suspect. When we consider that attorneys fees for a bond issue in Ocean County would far exceed the fees for an identical issue in Sussex County, according to the County Bar Association fee schedules, the bar as a whole is hard put to justify such a deviation on any logical ground.

I think there can be no real disagreement with the proposition that those attorneys who serve the public must be accountable to the public. From the

studies and surveys which have been made throughout the State by various organizations, it has become apparent that in many cases attorneys have charged fees to public authorities which, at least on the face of things, appear to far exceed justifiable limits. In making this statement I would certainly caution that in order for any specific judgment to be made in any particular case an examination would have to be made of the facts pertaining to the particular situation. However, in those cases where charges have been made strictly on a percentage fee basis, with no indication in the billing to the public agency as to the time spent or the services rendered, legitimate questions can and ought to be raised by the agencies involved.

We must recognize that public bodies have not only the right but the obligation to question any items in any bill for professional services which they do not understand or about which they desire further information.

Fees for professional services can never be considered, in my judgment, immune to such legitimate inquiry, yet I am aware of the fact that some attorneys in the State take the position that any bill which is rendered should be paid without question by the public agency involved regardless of whether it is itemized or not, and that the public body or agency has little if any right to question it.

While this may have been an acceptable attitude in times past it is becoming increasingly apparent that not only the public bodies but the courts and the majority of the legal profession itself will not support or tolerate this kind of attitude.

(1) Specifically, with respect to bond issues, I see personally no serious reasons why basically the charge should not be <u>primarily</u> based upon an hourly

charge for services rendered, with a detailed bill to support the total billing.

(2) Recognizing that there is perhaps a greater degree of responsibility in connection with a bond issue than with most normal municipal or school work, I feel that in most cases the additional responsibility can be adequately compensated for on the basis of a higher than normal hourly charge.

One of the interesting and elusive questions in this area is, <u>just what is the potential liability of the local bonding attorney</u>? We recognize that the attorney is dealing in many cases with bond issues running into the millions of dollars, yet I personally know of no instance where there has been a successful suit brought against a local bond attorney for liability arising out of any negligence in connection with a bond issue. I hasten to say that I admit here only my ignorance and do not wish this to be taken in any way as a statement to the effect that there never has been such a situation. But, in any event, before one can really talk about what kind of fees are reasonable the whole question of potential liability ought to be very thoroughly investigated since it obviously does play a large part in the present justification for the percentage fee. At the same time it cannot seriously be contended that there is no potential liability.

As Mr. Kearns so ably illustrated, the percentage fee is further subject to attack on the basis that the actual work involved in bond issues varies tremendously with the type of issue, the type of public body authorizing the issue, the amount of the issue and many other factors. Handling a bond issue for a Type II school district where the debt limit is exceeded, for example, involves many more problems than handling a small municipal issue where local banks will pick up the entire issue and no brochure or hearing is required;

or handling a bond issue for a parking authority where procedures are even less formal than in the case of municipal general obligation bonds and where, in many instances, particularly with smaller issues, the opinion of the local attorney alone is acceptable to the lending institution.

The Bar Association's recommendation that a retainer agreement be entered into between the public body and the attorney in connection with bond issues is a most salutary one since it would spell out in detail what is expected of the attorney and what is not expected. Often times, the attorney becomes involved in a great amount of work which relates to the project being financed by the bond issue but is not really related to the bonding proceedings as such, and I have no doubt that very often the seemingly exorbitant fees charged in connection with bond issues really compensate the attorney for a great deal of work related to but not directly involved with the issuance of bonds. Since there seems to be no uniformity of practice throughout the state in such matters, it seems increasingly clear that the attorneys themselves must establish some kind of uniform format or accepted practice in this area.

The fact is that unless the Bar as a whole does move to act positively, action is almost certain to be taken either by the legislature or the courts. During the present session of the legislature, for example, Assembly Bill A-2477 was introduced, which proposed to limit attorney's charges on bond issues to a reasonable hourly charge. The bill was poorly drawn and has not received support in the legislature, but the mere fact that the bill was introduced shows which way the wind is blowing. It is equally possible that the Supreme Court, by rule, may step in to establish guidelines in this area similar to those created dealing with contingent fees in negligence cases. Therefore, the more study that is made of the subject, both by the Bar and by

other groups, the better position the Bar will be in to change the present inequitable practice with a new format of charges which will be fair to both the public and the attorney.

It is apparent that there is not a great deal of disagreement in the positions taken by Mr. Kearns, Mr. Kolesar and myself, yet there is one suggestion made by Mr. Kolesar with which I must disagree. Mr. Kolesar speaks of representation of the public in the matter of establishing fees on projects involving bond issues. It seems to me that members of the constituted bodies, such as boards of education and municipal governing bodies, do in fact represent the public and that any further public representation would be redundant. Moreover, if there is a retainer agreement between the attorney and the public body involved, such document would be a public record which could be inspected by any member of the public.

I might add here that our Bar Association Committee was particularly indebted to Mr. Louis Wallisch, Jr. who provided us with a form of agreement which he himself has used over the years and which spells out, in detail, the services which the attorney is to render.

In concluding, I think it evident that all three members of this panel recognize that change in the billing by attorneys for services rendered in connection with bond issues is in the spotlight; that many present practices are inequitable and insupportable, and that it is time for a change. This change must and should come, however, only after orderly study and development of guidelines by the Bar itself working with other interested groups to the end that a uniform practice may ultimately prevail throughout the state, which will be fair to all parties concerned.

COMMENTS

JOHN N. KOLESAR

John N. Kolesar received a B. Litt. in Journalism from Rutgers University. A former newspaperman and deputy commissioner of the New Jersey Department of Community Affairs, Mr. Kolesar is presently a research associate at the Center for the Analysis of Public Issues in Princeton, New Jersey.

I think I should start by explaining how a non-lawyer like me came to be here. The Center for Analysis of Public Issues, vaguely modeled on Nader's Raiders, had received a number of suggestions last year that there were some peculiar things to be found in the way our government agencies issue bonds. One of those peculiar things was supposed to be the way legal fees for bond work were determined. As a member of the Center staff, I took on the assignment of looking into this obscure corner of governmental activity.

We did find some strange things happening, and we reported on them in a booklet we published a month or two before Bill Kearns' committee issued its report. The two reports were completely independent of each other and neither should be considered a response to the other. There were some great contrasts between them. I know Bill Kearns thinks my report was somewhat sensationalized, despite the considerable efforts at restraint which I made. His report, I thought, was a bit too circumspect in places.

Nevertheless, there were some important areas of agreement among the recommendations made in the two reports.

For instance, both reports agreed that percentage fees for public bond issue work were inappropriate and should be abolished. The Center's report

found that percentage fees often resulted in payments that were unjustifiably high, and that was our major reason for making the recommendation. The Bar Association Committee made the recommendation without ever stating explicitly that there might be overcharges.

In a second area of agreement, both reports favored paying attorneys for their work out of current budgets, not from the proceeds of bond issues. Both agreed the present practice is secretive, wasteful, and an imposition on lawyers and the public. The only difference was that the Bar Association Committee backed away from an unqualified recommendation on the subject, because public agencies, particularly school boards, would be reluctant to add legal fees to the current budgets they must submit to voters. The Center's report considered the practice deceptive, of doubtful legality when applied to school bonds, and recommended that it be prohibited regardless of what the school boards might prefer.

A third major area of agreement was a conclusion in both reports that many more aspects of the bond issue process deserved looking into. There was specific mention of such things as the role of special bond counsel, fees for architects and engineers and methods of lowering interest rates.

I might say that I was pleasantly surprised at the report of the Bar Association Committee. If it were implemented, there would be a great improvement over the practices of the past.

I would like to be able to stop right there with praise for the Kearns' committee proposals, but I'm afraid I have to point out that there were some differences between the report issued by the Center and the one issued by the Bar Association Committee. These differences went beyond mere rhetorical flourishes.

A major point in the Center's report was the public's total exclusion from the process of setting attorney's fees for bond issues. The public enters into the transaction without any of the standard protections against being overcharged. There is no bargaining, no competition, no regulation, and no participation in setting fee schedules. To say that the public is represented on the bodies paying the fees is to ignore political and governmental realities. If the public feels aggrieved by a bond fee paid to an attorney, it is given the privilege of filing an appeal with a group of attorneys. If this sounds like a fair arrangement to you, then I ask: Would the legal profession accept the other side of the bargain? Would lawyers permit a public agency to set their fees for them without any participation on their part, with all appeals to be handled by a board composed only of non-lawyer taxpayers? I doubt it. I don't believe any lawyer would advise a client of his to enter into a transaction on such one-sided terms. I believe there must be public participation early enough in the game to carry some real meaning. If there are to be fee schedules used by the legal profession, I believe there must be some outside participation or supervision of those schedules, at least for those fees which are paid from tax funds. No profession -- whether it be attorneys, engineers, accountants or whatever -- should expect to set its pay scales in a totally one-sided process, especially where the payments come from tax sources.

The Bar Association Committee, while it made some recommendations for action, nowhere indicated that anyone but attorneys should take part in those actions. I believe that lack of public participation is a serious omission, both on principle and as a practical matter. I have serious doubts that merely abolishing the percentage fee and basing charges on time, effort and responsibility will assure taxpayers of a fair shake. I run into a lot of lawyers who say they already base their bond issue charges on time, effort

and responsibility. Yet they wind up handling the legal affairs of small towns at pay scales exceeding a supreme court justice's.

I should think that the Bar itself would want to have some outside participation in its processes for setting fees, if only to make sure that it has an eyewitness to its good faith. It would be a shame if the Bar reformed these practices for the public's benefit and then found it had no way of convincing the public of the fact. I sensed in the Bar Association Committee report a feeling that some attorneys, at least, believe they are misunderstood by the press and public. I believe there is misunderstanding. The only way to end it, I think, is for the Bar to open its doors, let the public in and let the facts out. Thank you.

IV

The Law of Student Suspensions and Expulsions in New Jersey

WILLIAM J. ZAINO, ESQ.

William J. Zaino is a graduate of Boston College and the Duke University School of Law. In his capacity as staff attorney for the Somerset County Legal Services, Mr. Zaino has assisted in several cases involving representation of students before the Commissioner of Education and the courts of this state. He is a member of the New Jersey Bar Association and the National Legal Aid and Defender Association.

The student's main point of contact with governmental authority is his school. By law he is compelled to attend school until he reaches a certain age, and while in attendance at school he must obey the reasonable rules and regulations promulgated by the school officials. If he does not abide by these rules he is subject to punishment which may include suspension or expulsion from the school system.

The purpose of this paper is to examine the existing law in New Jersey relating to suspension and expulsion of public school pupils at the pre-college level. Particular attention is focused upon the rights of the student who has been suspended or who faces expulsion from school.

The terms "suspension" and "expulsion" are often confused, but there is a great difference in their true meanings. "Suspension" refers to the temporary denial of the student's right to attend school. A suspension is normally imposed by the school principal and is usually of short duration. "Expulsion" refers to the permanent denial of the student's right to attend school and may be imposed only by the local board of education.

Not too many years ago the student facing suspension or expulsion from school was afforded little protection from arbitrary action by school officials

Less than fifteen years ago Professor Warren A. Seavey of Harvard made this comment concerning the rights of students threatened with expulsion from the public schools:

> At this time when many are worried about dismissal from public service, when only because of the overriding need to protect the public safety is the identity of informers kept secret, when we proudly contrast the full hearings before our courts with those in the benighted countries which have no due process protection, when many of our courts are so careful in the protection of those charged with crimes that they will not permit the use of evidence illegally obtained, our sense of justice should be outraged by denial to students of the normal safeguards. It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket.[1]

The expansion of students' rights since the time of Professor Seavey's comment has been dramatic. Since the scope of this paper is necessarily limited anyone who is interested in pursuing the matters it deals with in greater depth is referred to the excellent article by William G. Buss, "Procedural Due Process for School Discipline: Probing the Constitutional Outline," which appears in the University of Pennsylvania Law Review, Volume 119, Number 4, February, 1971.

The right to a free public school education for all New Jersey children between the ages of five and eighteen is guaranteed by the New Jersey Constitution.[2]

N.J.S.A. 18A:38-1 provides that public schools shall be free to any child over five and under twenty years of age who is domiciled within the school district.[3] Compulsory education for children in the state between the ages of six and sixteen is required by N.J.S.A. 18A:38-25.[4]

Like other rights the right to education has been made subject to certain restrictions. Pupils must submit to the authority of teachers and others in authority over them, and they must pursue their prescribed courses of study and comply with the rules established by law for the government of their schools.[5]

Pupils who are guilty of continued and willful disobedience, or of open defiance of teachers, or who damage school property, or who otherwise disrupt the school system are subject to punishment and to suspension or expulsion from school.[6] Conduct which constitutes good cause for suspension or expulsion runs from inciting other pupils to be truant to physically assaulting pupils or teachers.[7]

The principal may suspend any pupil from school for good cause, but such suspension must be reported forthwith to the district superintendent, who in turn must report the suspension to the district board of education at its next regular meeting.[8] A suspended pupil may be reinstated by the principal or superintendent prior to the second regular meeting of the board of education after suspension unless the board has reinstated the pupil at its first regular meeting after the suspension.[9] No suspension may be continued beyond the second regular meeting of the board of education after such suspension unless the board continues it.[10]

The power to expel a pupil from the school system is vested solely in the board of education.[11]

A pupil may appeal a suspension or expulsion decision of the board of education to the Commissioner of Education.[12] Appeal from a decision of the Commissioner is to the State Board of Education.[13] Decisions of the state board are reviewable by the courts.[14]

Beyond the handful of laws mentioned above there are no statutory provisions in New Jersey directly governing the procedures to be followed by a principal in suspending a pupil or by a board of education in continuing a suspension or in expelling a student. The courts, however, have spoken in this matter.

Only during the past ten years, beginning with the decision in Dixon v. Alabama State Board of Education,[15] has it been widely recognized that the requirements of procedural due process under the Fourteenth Amendment are applicable with respect to suspension or expulsion of pupils from public schools. Dixon involved the expelling of students from state college without providing the students any of the procedural safeguards required by due process. The guidelines stated by the court in Dixon are important and are worth repeating here. The court said:

> For the guidance of the parties in the event of futher proceedings, we state our views on the nature of the notice and hearing required by due process prior to expulsion from a state college or university. They shall, we think, comply with the following standards. The notice should contain a statement of the specific charges and grounds which, if proper, would justify expulsion under the regulations of the board of education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses is required. Such a hearing, with the attending publicity and disturbance of college activities might be detrimental to the college's education atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the board, or at least to an administrative official of

> the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled. [16]

These guidelines were quoted as setting forth the minimum requirements for a suspension hearing in R.R. v. Board of Education, Shore Reg. H.S.[17] a recent New Jersey case. R.R. involved a high school student who was given neither a preliminary hearing nor a full hearing before he was suspended from school. In his decision ordering the board to readmit the suspended student, Judge Merritt Lane, Jr. held that the New Jersey statutes relating to suspension and expulsion must be construed so as "to afford students facing disciplinary action involving the possible imposition of serious sanctions, such as suspension or expulsion, the procedural due process guaranteed by the Fourteenth Amendment."[18] Judge Lane further held that when school authorities have reasonable cause to believe that a student presents a danger to himself, to others or to school property, they may temporarily suspend the student for a short period of time pending a full hearing which will afford the student procedural due process. Under ordinary circumstances, however, the student must be afforded preliminary hearing before he may be suspended.[19] The preliminary hearing may be completely informal, but the full hearing "clearly depends upon the circumstances of the case."[20] At a minimum the student must be afforded the rights as mandated by Dixon.[21] In no case should the full due process hearing take place more than 21 days from the suspension.[22]

The right to such due process hearing has been recognized by the Commissioner of Education in Scher v. Board of Education, West Orange.[23] But in a more

recent case the Commissioner ruled that a local board at an expulsion hearing did not have to name the accusing witnesses or produce them for testimony or cross-examination.[24] The Commissioner based his decision on a finding by the local board that the student witnesses did not want to testify for fear of physical reprisal. The case involved a number of students, all girls, who were accused of physically assaulting two other students, also girls. Five of the accused girls were expelled from school by the board of education after hearings at which the accusing witnesses were not named and were not present for testimony or cross-examination. In reaching its decisions to expel the board relied upon typewritten statements of accusations against the accused made to the school authorities by the unidentified witnesses. In Tanya Tibbs v. Board of Education of the Township of Franklin[25] the Appellate Division, in per curiam opinion, reversed the expulsions for failure to produce the accusing witnesses for testimony and cross-examination. The matters were remanded, not to the local board, but to the Commissioner of Education for hearing de novo should the local board choose to prosecute them.[26]

Each of the three judges who joined in the per curiam decision filed a separate concurring opinion. The opinions are interesting for the different viewpoints they represent concerning the rights of students facing suspension or expulsion.

Judge Conford stated his belief that a formal due process hearing was necessary if a student faced expulsion or a long-term suspension, but that such a hearing was not required for administrative action short of expulsion or long-term suspension.[27] In the context of the instant case he found that "not only should the accusing witnesses be identified in advance but also, as a general matter and absent the most compelling circumstances bespeaking a different course, be produced to testify and to be cross-examined."[28]

Judge Kolovsky expressed his belief that in suspension or expulsion hearings before the board of education the accused student always had the right to demand that his accusers appear in person to answer questions.[29] In Judge Kolovsky's view the right of confrontation exists even if the penalty to be imposed is less than expulsion or severe term of suspension.[30]

Judge Carton took the position that any procedure conducted by the local board has to comply with the minimum requirements set forth in Dixon. According to Judge Carton due process does not require the in person production of adverse witnesses and the right of cross-examination at the local board hearing.[31] Due process can be assured by the exercise of the right to appeal the decision of the local board to the Commissioner, before whom the witnesses against the accused student must be produced to testify and to be subject to cross-examination.[32]

Tanya Tibbs v. Board of Education of the Township of Franklin and R.R. v. Board of Education, Shore Reg. H.S. represent the only New Jersey court decisions relating directly to the due process requirements that must be met in expulsion and long-term suspension hearings. But from these cases and from the pertinent statutes some conclusions may be drawn concerning suspensions and expulsions:

1. New Jersey statutes relating to suspension and expulsion must be construed to require public school officials to afford pupils facing serious sanctions, such as long-term suspension or expulsion, the procedural due process guaranteed by the Fourteenth Amendment.

2. A principal may suspend a pupil by virtue of his statutory power. The suspension may be of short duration only, pending a full due process hearing. Under ordinary circumstances the pupil must be afforded a preliminary hearing as well as a full hearing. Under no circumstances may a suspension by a

principal be continued beyond the second regular meeting of the board of education unless the board so continues the suspension.

3. Only the local board of education has the power to expel a student.

4. A due process hearing, whether before the principal in a suspension matter or before the local board in a continuation of suspension matter or an expulsion matter, necessarily includes the accused student's right to: a) notification of the charges against him; b) the names of adverse witnesses; c) copies of statements and affidavits of those adverse witnesses; d) the opportunity to be heard in his own defense; e) the opportunity to present witnesses and evidence in his own defense; f) the opportunity as a general matter, and absent the most compelling circumstances warranting a different course, to confront and cross-examine adverse witnesses; and g) the opportunity to be represented by counsel.

Remaining unresolved are many of the most difficult problems which arise in this area of school law. Where is the line to be drawn between a long-term suspension subject to due process requirements and a short-term suspension entirely within the discretion of school officials? If representation by counsel is necessary in order to assure a fair hearing is the indigent student entitled to state appointed counsel? Is the indigent student entitled to a free transcript of his hearing for purposes of judicial review? What rules of evidence should apply at the suspension or expulsion hearing? Must the accused student be warned of his right to remain silent?

More important, perhaps, are considerations relating to the appropriateness and effectiveness of suspension and expulsion as approaches to student discipline. The schools exist for the education of the students. When a

student is denied his right to attend school he is deprived of the primary means provided by the state to make him a better educated citizen. All too often suspension and expulsion serve to unload the school's problems on the community-at-large. The Commissioner of Education recognized this in his decision in Scher:

> Termination of a pupil's right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible...It is obvious that a board of education cannot wash its hands of a problem by recourse to expulsion. While such an act may resolve an immediate problem for the school it may likewise create a host of others involving not only the pupil but the community and society at large. The Commissioner suggests, therefore, that boards of education who are forced to take expulsion action cannot shrug off responsibility but should make every effort to see that the child comes under the aegis of another agency able to deal with the problem. The Commissioner urges boards of education, therefore, to recognize expulsion as a negative and defeatist kind of last-ditch expedient resorted to only after and based upon competent professional evaluation and recommendation.33

School officials and boards of education should recognize the drastic nature of long-term suspension and expulsion and should provide the student involved in an expulsion or suspension matter with the full protection that the law requires. Failure to do so will result in harm not only to the student but also to the school and the community-at-large.

1. Seavey, "Dismissal of Students: Due Process" 70 Harv. L. Rev. 1406, 1407 (1957).

2. New Jersey Constitution (1947), Art. VIII, Sec. IV, Par. 1., provides: The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the state between the ages of five and eighteen years.

3. N.J.S.A. 18A:38-1 provides in part: Public schools shall be free to the following persons over five and under 20 years of age: (a) Any person who is domiciled within the school district.

4. N.J.S.A. 18A:38-25 provides: Every parent, guardian or other person having custody and control of a child between the ages of six and 16 years shall cause such child regularly to attend the public schools of the district or a day school in which there is a given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school.

5. N.J.S.A. 18A:37-1.

6. N.J.S.A. 18A:37-2 provides: Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him, or of the habitual use of profanity or of obscene language, or who shall cut, deface or otherwise injure any school property, shall be liable to punishment and to suspension or expulsion from school.

Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include, but not be limited to, any of the following: a. Continued and willful disobedience; b. Open defiance of the authority of any teacher or person having authority over him; c. Conduct of such character as to constitute a continuing danger to the physical well-being of other pupils; d. Physical assault upon another pupil or upon any teacher or other school employee; e. Taking, or attempting to take, personal property or money from another pupil, or from his presence, by means of force or fear; f. Willfully causing, or attempting to cause substantial damage to school property; g. Participation in an unauthorized occupancy by any group of pupils or others of any part of any school or other building owned by any school district, and failure to leave such school or other facility promptly after having been directed to do so by the principal or other person then in charge of such building or facility; h. Incitement which is intended to and does result in unauthorized occupation by any group of pupils or others of any part of a school or other facility owned by any school district; and i. Incitement which is intended to and does result in truancy by other pupils.

7. Id.

8. N.J.S.A. 18A:37-4 provides: The teacher in a school having but one teacher or the principal in all other cases may suspend any pupil from school for good cause but such suspension shall be reported forthwith by the teacher or principal so doing to the superintendent of schools of the district if there be one. The superintendent to whom a suspension is reported or if there be no superintendent in the district, the teacher or principal suspending the pupil shall

report the suspension to the board of education of the district at its next regular meeting. Such teacher, principal or superintendent may reinstate the pupil prior to the second regular meeting of the board of education of the district held after such suspension unless the board shall reinstate the pupil at such first regular meeting.

9. Id.

10. N.J.S.A. 18A:37-5 provides: No suspension of a pupil by a teacher or a principal shall be continued longer than the second regular meeting of the board of education of the district after such suspension unless the same is continued by action of the board, and the power to reinstate, continue any suspension reported to it or expel a pupil shall be vested in each board.

11. Id.

12. N.J.S.A. 18A:6-9 provides: The Commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the Commissioner.

13. N.J.S.A. 18A:6-27 provides in part: Any party aggrieved by any determination of the Commissioner may appeal from his determination to the State Board.

14. Rule 2:2-3.

15. 294 F. 2d 150 (5th Cir. 1969), cert. den., 368 U.S. 930 (1961).

16. Id. at 158-159.

17. 109 N.J. Super. 337 (Ch. Div. 1970).

18. Id. at 347.

19. Id.

20. Id. at 348.

21. Id. at 350.

22. Id.

23. 1968 New Jersey School Law Decisions, 92.

24. Tanya Tibbs v. Board of Education of the Township of Franklin, 114 N.J. Super. 287 (App. Div. 1971).

25. Id.

26. The board chose instead to appeal the case to the Supreme Court of New Jersey. The Supreme Court will hear the case during the present term.

27. 114 N.J. Super. at 299 (Conford, P.J.A.D., concurring).

28. Id. at 296.

29. Id. at 300 (Kolovsky, J.A.D. concurring).

30. Id. at 302.

31. Id. at 305 (Carton, J.A.D. concurring).

32. Id. at 304, 306.

33. 1968 New Jersey School Law Decisions, 92.

COMMENTS

DR. JOHN J. HUNT

Dr. John J. Hunt is a graduate of Princeton University and Harvard University. He currently serves as the superintendent of schools for the East Windsor Regional School District. Dr. Hunt is a member of the New Jersey Association of School Administrators, the American Association of School Administrators, and many local service organizations.

While listening to Mr. Zaino two former experiences presented themselves vividly in my mind.

The first was my time with HEW working under the then Assistant U. S. Commissioner of Education, Dave Seeley, whose responsibility it was to assure compliance with Title IV of the then new Civil Rights Act of 1965. Dave hired 99 law school students from around the country and one doctoral student in education. He let us calmly deliberate and set plans of action and then sent us out into the realities of such places as Pulaski County, Arkansas and Bent Nickel, Texas where, at that time at least, the law was thought wrong and at the very minimum communist inspired.

A second set of experiences came to mind as Mr. Zaino spoke, much more recent. These thoughts include the experience of reviewing actual preliminary hearings conducted by school building administrators to determine the facts warranting a suspension and also warranting the superintendent's attention for consideration as worthy of a recommendation to the board for a board expulsion hearing. At the same time, the thoughts included the vivid experiences of board hearings, due process, delays, the press and the public, where at the time the law was thought wrong and at the very minimum either communist or facist inspired depending on the vantage point of the viewer.

It is largely from this sort of reference that my remarks come. We must, I am sure, recognize that our form of government with its heavy dependence on law had an intended theme at its outset, namely: that government will be with the "consent of the governed." This theme, "the consent of the governed," as I call it, was an unheard-of idea just a short two hundred years ago. Up until then most of those who governed did so by contending a divine right to govern. We are the first to suggest, adopt and live under a system of government and laws which has a basis in a theme such as the "consent of the governed."

I can report to you, after talking with the newly enfranchised 18 year old president of the Hightstown High School on the topic that the "consent of the governed" is an idea that is very much alive today. I would suggest that the word consent in the phrase "consent of the governed" is the one which is kicking. We might even say that the latter years of the sixties saw various new techniques brought into use by segments of the governed to help them represent to other segments of the governed that consent was lacking.

This year's president of the Hightstown High School Student Council is a fine young man. He took Mr. Zaino's rough draft on his own to the class of students in American History and sought out their opinions. He reported the results to me the day before yesterday. You will be please to know, Mr. Zaino, that apparently they read your draft with polite interest, but they went straight to the actual law and concentrated their collective attention to it as you had appended it, especially N.J.S.A. 18A:37-2, which outlines conduct constituting good cause. The responses, in summary, were agreement that such conduct, if rightly proved, should result in expulsion, arrest in some instances, and payment for damages. As an aside, I shall mention a personal satisfaction

which evidenced itself with regard to item (G) of 18A:37-2 (the description of participation in unauthorized occupancy, etc.) Their conclusion was that they did not consider this item applicable in their high school because they did not have to demonstrate to get the attention of the building administration since their principal, Mr. Howard Scarborough, and staff "will talk to anybody." Their reaction to items (H) and (I) (which refers to persons who incite others to occupy, demonstrate, etc.) should be heartening to us all. It is their opinion that the incited should receive the same consequences as the incitor since we must consider each person as responsible for his own actions.

Finally, let me add only one other point. Jeff Grayden, the Council president, was using a lexicon local to East Windsor (which I will translate to you) when he said "The laws are for the 5 and everybody else has to function within it." What we have been saying in East Windsor is that we cannot treat, or administer rules which were written, that treat all 100% of the students (or employees for that matter) as criminals when only 5% at most behave that way. If we do, then the 95 share a common cause with the 5. However, if we treat all 100% as law-abiding, then the 5% who have yet to learn law abiding behavior will quickly exhibit themselves, without the common cause share, and this 5% can be dealt with and helped while the 95 function as they desire within the rules.

So, when Jeff says that 18A:37-2 is for the 5 and everybody else must function within it, I believe we are hearing a mind far better than mine saying we must be cautious with legislation which implies to the governed that they are all criminals. We should know better after two hundred years. Thank you.

V

The Public Right-to-Know Law and School Board Documents

THOMAS P. COOK, ESQ.

Thomas P. Cook is a graduate of Princeton University and has a law degree from the University of Virginia. A practicing attorney since 1949, Mr. Cook was a deputy attorney general for the State of New Jersey, assigned to the State Department of Education, and has served on the Princeton Township Committee. Mr. Cook has been counsel to the New Jersey School Boards Association since 1959. He also serves as counsel to the Princeton Housing Authority, the Princeton Conservation Commission, and to the Princeton Regional, Lawrence Township, Madison Borough and Hopewell Valley Regional Boards of Education.

Boards of education and school officials are frequently called upon to give out information from documents and records maintained in the course of running a school system. Yet the information requested is often of a sensitive or confidential nature, and therefore, its disclosure may do harm or cause injustice to individuals involved or may unduly invade a person's basic right of privacy. This talk will deal with the conflict between these two concerns, i.e. the right-to-know and the right to keep confidential, insofar as this conflict relates to school records.

To make the issue more vivid, let me pose three concrete questions:

1. Is a parent entitled to examine all information in the files or records in the school of a district pertaining to his child? Does he have a right, for example, to know not only his child's achievement test scores or class grades, but also the records of a guidance counsellor or school psychologist which contain sentiments expressed by the pupil to his mentor in confidence?

2. May a board of education bind itself and its staff to secrecy in the handling of grievances against school personnel, or does the public have a right to know of all complaints made against a teacher or a principal?

3. May the board and the teachers' association make a binding agreement that all progress on negotiations be kept confidential until the final contract has been agreed on?

I will offer conclusions on these and numerous similar questions after we have first examined the principles of law and the considerations of policy which may bear upon any particular situation.

Section 47:1A-1 of the New Jersey Statutes, known as the "Right-to-Know Law,"declares it to be the public policy of this state that public records shall be readily accessible for examination by the citizens, with certain exceptions for the protection of the public interest. Section 47:1A-2 goes on to provide that "except as otherwise provided by law, executive order of the Governor, rule of court, or regulation promulgated under the authority of law, all records required to be made or kept on file by any governmental board or body shall be deemed public records," and that every citizen "during the regular business hours maintained by the custodian of any such records, shall have the right to inspect such records." The statute also authorizes citizens, during such regular business hours and under the supervision of the custodian, to copy the records by hand or to purchase copies thereof; and copies must be made available upon the payment of such price as is established by law.

As a general rule, therefore, the public has the right to examine all records which the school district is required to make or keep with respect to educational policy, textbooks, courses of study, budget and financial matters, school facilities, the qualifications and compensation of school personnel,

and countless other subjects in which the citizens have a legitimate interest. Indeed, action on such matters can be taken only at a public board meeting, and the citizens are entitled to scrutinize all such action in detail. N.J.S. 18A:10-6; 10:4-1 et seq.

It is the exceptions to this general rule which cause us the problems. We have already noted the statutory provision that the exceptions may be made "by law, executive order of the Governor, rule of court, or regulation promulgated under authority of law."

The first of these sources which we should notice is Executive Order No. 9, promulgated by Governor Hughes, in an attempt to create a uniform and statewide basis of exclusion of certain records from the general "Public Records" category. The Order states in part:

> "The public interest requires that the public records which are excluded from the application of Chapter 73 (P.L. 1963) be excluded on a uniform and statewide basis with full regard for the need to balance the right, in a democracy, of the public to know. against the risk of unintentional harm or injustice to individuals that might be occasioned by indiscriminate exposure of certain records containing data of a sensitive or personal nature without regard to the motivation or justification of those seeking to inspect or copy records."

The Order then sets forth certain categories of documents which will not be deemed "public records," and of these the principal ones of concern to boards of education and school attorneys are the following: "Personnel and pension records which are required to be made, maintained or kept by any state or local governmental agency; records concerning...reportable diseases of named persons required to be made, maintained or kept by any state or local governmental agency;" and required records "which would disclose information concerning illegitimacy."

Other records which have been classified as confidential at the state level will be noted later on in this talk when I deal with more specific items.

At the local level, the all important fact to note here is that the board of education has broad authority under N.J.S. 47:1A-2 and 18A:11-1 to adopt rules and regulations on the keeping and disclosure of records and to preserve the confidential nature of such records where reasonable and appropriate. By the same token, if the board does not have sufficient reason to direct that a certain record be kept confidential, the regulation to that extent will be held invalid.

The foregoing principles are exemplified by the decision of the Appellate Division in Irval Realty, Inc. v. Board of Public Utility Commissioners, decided June 28, 1971, 115 N.J. Super. 388. That case involved the validity of a regulation of the Board of Public Utility Commissioners which required the filing of reports by both the board staff and the Utility Company in cases of accident. The board regulation further provided that all records relating to accidents and the investigation thereof should not be deemed public records. A plaintiff who suffered damages due to an explosion sought to examine the records with regard thereto which were filed with the board as required, contending that the regulation making these reports confidential was unreasonable and invalid. The board advanced several reasons for so treating the reports, pointing out among other things that if the reports were made available to persons who intended to sue the utility, the people making those reports would be "less than candid" and the reports therefore would not effectively serve their purpose of indicating what safety practices should be recommended. The Appellate Division affirmed a Superior Court judgment ordering the board to

produce and permit inspection and copying of the accident reports. It held that the right of the plaintiffs to be accorded substantial justice in the litigation of their claims outweighed the board's reasons for keeping the records confidential, and accordingly it held invalid that portion of the regulation which prohibited the disclosure.

Reviewing the law on this general subject, the court noted that at common law a citizen was entitled to inspect public records provided he showed a requisite interest therein; that this right of inspection remains, merely supplemented by the "Right-To-Know Law;" and that exclusions of public records from disclosure can be made only when necessary for the protection of the public interest or other overriding purposes. Citing with approval the Superior Court case of Bzozowski v. Penn-Reading Seashore Lines, 107 N.J. Super. 467 (Law Div. 1969), the Appellate Division observed that executive orders and regulations promulgated under the "Right-to-Know Law must bear a relationship to public policy--the need to protect a record from disclosure and the balance between such need and the interests of justice and litigants."

In addition to the laws and regulations concerning public records, we must recognize that the doctrine of privilege comes into play in many of the situations confronting the board. The subject of privleged communications is too big to be more than alluded to here. Suffice it to note that records containing or constituting privileged matter should not be open to public view, unless the privilege is waived by all parties entitled thereto. For example, the doctrine of privilege would seem to require that communications between a pupil and a school employee in the capacity of physician or psychiatrist be kept confidential even if they appear in a required report.

Of course, if the report or record in question is not required to be made or kept on file, as for example working papers which may have formed the basis for the official document, then by statutory definition such papers are not public records. See R.S. 47:1A-2.

For the guidance of all school personnel and the public, it is obviously desirable for the board of education to adopt regulations or policies as to what records may be disclosed or withheld, who if anyone shall be entitled to inspect, and under what conditions. All such regulations or policies, however, must accord with the rules of law and regulations adopted at the state level, and they must constitute a reasonable exercise of the board's discretion where the law delegates some flexibility to the local board. As to each type of record the board must decide what would be a reasonable policy in the light of all relevant considerations.

Let us now turn to certain specific areas of inquiry, the first one of which will be pupil records.

N.J.S.A. 18A:36-19 provides the following:

> "Public inspection of pupil records may be permitted and any other information relating to the pupils or former pupils of any school district may be furnished in accordance with rules prescribed by the state board, and no liability shall attach to any member, officer or employee of any board of education permitting or furnishing the same accordingly."

Both the section of the Education Law quoted above and Section (2) (a) of the Executive Order require one to look into the rules and regulations promulgated by the State Board of Education and the Department of Education.

Part V of the Rules and Regulations of the State Board of Education outlines certain general rules concerning the inspection of school records.

Sections 1 and 2 provide that pupil records "may," in the board's discretion, be open to inspection by authorized representatives of the Selective Service System, by the FBI or the Armed Forces for purposes of determining the fitness of present or former pupils for induction into the Armed Forces; and that such records "may" also be open to inspection by persons who "in the judgment of the board of education" or any authorized officer thereof "have a legitimate interest in the records for purposes of systematic educational research, guidance and social science." Section 4 likewise provides that information in the records of a given pupil "may" be furnished upon request to employers and institutions of higher learning for purposes of employment or admission to such institutions. By using the word "may," the State Board has left it to the discretion of the local board in all of these cases to determine to what extent the records shall be made available for the purposes indicated.

By contrast, Section 3 of Part V of the State Board Regulations sets forth an apparently mandatory provision with respect to inspection of records by a parent or guardian; the section reads:

> "Items of information contained in the records of a given pupil <u>shall</u> be made available, upon request, for inspection by a parent, guardian or other person having custody and control of the child, or authorized representative of the same; provided, that after the pupil has attained the age of twenty-one years, the items of information shall be made available for inspection by the pupil or his authorized representative, and not to the parent or guardian."

However, despite the use of the word "shall" in Section 3, that section must be read together with Section 5 of the same rules, which reads as follows:

> "Nothing in these rules and regulations contained shall be construed to prohibit the board of education, or any officer or employee of the board designated by the board, to withhold items of information which, in the judgment of the said board, or its designated officer or employee, are of a confidential nature or in which the applicant for such information has no legitimate interest."

Sections 3 and 5 taken together would appear to put us right back where we started: The board can withhold items of information which, in its judgment, are of a confidential nature or are of no legitimate concern to the applicant. As we said before, however, the judgment or discretion of the board must be exercised within the limits of reason. As a general principle, then, individual pupil records are deemed confidential, the board having the right to disclose them only to persons having a special interest in them.

The parents of a student enjoy a preferred or privileged position as to the disclosure of information regarding their child's physical, mental and emotional development. Even in the case of the parent, however, there are certain records having to do with testing the child for abnormalities or handicaps which, for reasons to be given shortly, would seem to be within the right of the board to withhold. Let us consider several different types of these pupil records.

A. The parent or guardian, in my opinion, has a clear right to know academic test scores and grades of his child while he is a student in the school. Such knowledge should enable the parent to cooperate effectively with the school in furthering the child's education. Otherwise, these records should be available only to persons in the school who are directly concerned with the pupil, and they should not be made available to anyone else except as indicated in the State Board Regulations already reviewed. The child and his family are entitled to a right of privacy with respect to his past history and present progress. Put another way, these records may be considered privileged, and no one should be allowed to see them except if he has a proper interest, as for example a prospective employer or the enlistment officer of the Armed Forces.

B. Records of the pupil's character development and disciplinary situation would, in my judgment, likewise be within the parents' right to know, for the same reasons as given with respect to the pupil's academic performance. If the parent knows how the child is behaving in school and what problems of adjustment he is wrestling with, the parent again may be more helpful to his child's development than if he is kept in ignorance of the behavior in school. On the other hand, this kind of information should not be divulged publicly, for the protection of the child's reputation and on the theory that he should be constantly "growing up" and that misconduct during the process should not be held against him. See E.E. v. Ocean Township Board of Education, decided March 9, 1971, in which the Commissioner directed that no notation of a pupil's discipline infractions should be placed on his permanent record.

This brings to mind the requirement of N.J.S. 18A:37-4 that suspensions must be reported by the superintendent to the board at its next regular meeting. I have given the opinion to my boards that the statute does not require that the name or names of suspended pupils be mentioned in the public portion of a board meeting, but only the fact that a certain number of pupils were suspended during a certain period.

C. Reports of school psychologists or guidance personnel containing confidential statements made by the child to such members of the school staff should not be disclosed to anyone else, even parents, in order that the confidence placed by the child in these staff members may be kept and he may thereby be encouraged to be frank and honest in talking with his counsellors, so that they in turn may better help the child with his problems.

Furthermore, there are numerous technical records of examinations and tests for various types of physical, mental and emotional disorders or handicaps which may be accumulated by a Child Study Team. Many boards now keep such records confidential for several reasons: (1) Much of the material would be incomprehensible to the average layman and might serve only to alarm or confuse the parent. (2) Often the material gathered in such tests needs to be interpreted by qualified psychologists, medically trained personnel or other appropriate professionals, and the interpretation may be all important in the diagnosis and treatment of the child. (3) What the parent really needs is not to examine the details of tests and reports given by professionals, which may often be either blunt or even offensive to the parent, but rather the considered conclusions and recommendations of the Child Study Team, presented to the parent in such a way as to best secure the cooperation of the family in the attempt to overcome disorders or handicaps. For all these reasons, it seems well within the prerogative of the board to limit rather strictly the disclosure of records in this area.

D. In regard to the results of medical examinations, the State Board Regulations require that records thereof be maintained and that the local board adopt at least a minimum program of health service. Part IV, paragraph (8) provides that "the results of health examinations or of emergency treatment administered or recommended by the medical inspector shall be reported to parents, upon forms provided for the purpose by the board of education." These records would appear confidential also, with the parents being the only parties having a legitimate interest in the records with respect to the particular child.

E. Records of the performance of an individual after graduation from school should, in my view, be kept confidential between the school and the graduate

involved. The school has a legitimate interest in knowing about the academic success of its graduates, as this may constitute some evidence of the effectiveness of the school's educational program. Otherwise, such information would seem to fall within the right of privacy of the graduate.

F. In contrast to records of a named individual, gradewide test scores and districtwide composite test scores would appear proper concerns for the public at large. They may have a bearing on the effectiveness of the education program and the quality of the teaching in the particular class or throughout the district.

Turning now to records and reports concerning school personnel, we must distinguish between such matters as educational qualifications and experience of staff members and compensation to be paid them, which are clearly matters of public record and concern, and other material which would show up in the personnel file such as evaluations, reprimands, complaints by other faculty members or children or parents, and similar material bearing upon the teacher's conduct and performance. This latter type of information, in my opinion, should not be open to the public unless or until a controversy arising therefrom reaches the stage where the law requires a public hearing to be held before the Commissioner. Alleged grievances or charges against a faculty member must be kept confidential in the early stages in order to afford reasonable protection to the reputation of the accused and to avoid deterioration of morale within the staff. Because of the harm which publicity in such matters can cause to the school system, it is well within the province of the Board--and perhaps it is mandatory under Executive Order No. 9--that personnel matters of this nature be kept confidential until they become the subject of proceedings before the Commissioner.

As an aside, I would advise that all charges against individual officers or employees of the school system be processed in accordance with established grievance procedures where applicable. Failure to do so has been shown by experience to be harmful to the school system and has been condemned by the Commissioner and the courts. See, for example, In the Matter of the Tenure Hearing of Frank C. Marmo, 66 S.L.D. 112; Taylor v. Houston, an unreported case decided by the Appellate Division February 2, 1965. In the Taylor case, the court held that the failure of the employee in question to follow established grievance procedures, along with other misconduct on his part, constituted sufficient cause for his removal.

Most grievance procedures agreed upon between boards and teachers' associations provide that all meetings and hearings thereon shall be conducted privately, and that all documents dealing therewith shall be filed in a separate grievance file and shall not even be kept in the personnel file of any participant. These stipulations seem to me reasonable and appropriate because a grievance can usually be settled much more effectively when it is kept confidential than if it becomes a public issue. However, where the controversy concerns educational policy or other matters of public interest not involving censure of any individual, any party interested therein would seem to have the right to bring it out for public scrutiny and to by-pass the grievance procedure in that instance.

The third and last category of records I shall discuss deals with the documentation of steps in the negotiation process and in proceedings to handle impasses. In pursuance of the objective of Chapter 303 of the Laws of 1968 to effectuate settlement of labor disputes in the public sector and in accordance with its rule-making power, the Public Employment Relations Commission has

established procedures for maintaining confidentiality during the early stages of any impasse. Thus Rule 19:12-3 provides that upon being appointed by the Executive Director, a mediator's function shall be to assist all parties to come to a voluntary agreement. The rule goes on to state: "...The mediator is to make no public recommendation on any negotiation issue in connection with the performance of his service nor is he to make a public statement or report which evaluates the relative merits of the positions of the parties..."

Rule 19:12-4 further provides: "Information disclosed by a party to a mediator in the performance of his mediation functions shall not be divulged voluntarily or by compulsion. All files, records, reports, documents or other papers received or prepared by a mediator while serving in such capacity shall be classified as confidential. The mediator shall not produce any confidential records of, or testify in regard to, any mediation conducted by him, on behalf of any party to any cause pending in any type of proceeding."

The mediator then submits "one or more confidential reports to the Executive Director," after which the Executive Director may invoke fact-finding with recommendations for settlement.

Under section 19:12-8 the fact-finder may hold hearings..."which shall not be public unless all parties and the fact-finder(s) agree to have them public...Any findings of fact and recommended terms of settlement shall be submitted in writing to the parties privately and to the Executive Director. The findings and recommendations of the fact-finder(s) may be made public by the Executive Director if the impasse is not resolved within five days after the receipt of the recommendations of the fact-finder(s) by the parties."

The foregoing review shows that the PERC rules rest on the assumption that although there are strong reasons for the public to be informed of the outcome of negotiation and impasse proceedings, there are equally strong reasons

to protect the parties and allow for the least possible interference with the negotiation process. Experience undoubtedly shows that negotiating parties are more likely to reach an agreement when they are dealing privately with each other rather than when they are trying to impress their respective constituencies with public statements.

Offers, counter-offers, statements made in negotiating sessions, notes and minutes thereof, and the like do not constitute public records because no law or regulation requires that such records be maintained. Only the final contract--the result of the negotiations becomes a public record: N.J.S. 34:13A-8.2 requires the public employer to file all negotiated contracts with PERC following the consummation of negotiations.

Moreover, as with impasse cases, the policy of Chapter 303 requires, in my judgment, that documentation in the process of negotiations be kept confidential in order to facilitate good faith bargaining. If each offer or counter-offer were to be made public at the time, one can imagine the impediments and pressures which outside reaction would bring to the negotiations process. The public press might take delight in inflaming the situation, and the positions of the parties would tend to harden beyond recall.

Many other kinds of records may become the subject of requests for information upon which the board or its administrators will have to make a decision. I have discussed only a few of the possibilities here and time does not permit more. I would like to conclude simply by urging every board to adopt policies covering at least the subject areas which have been reviewed by me. Indeed, the formation of such policies seems contemplated by the State Board Rules.

In deciding upon a policy, or in meeting any unprecedented request for information, the board should in all events consult with its attorney, and he

in turn should advise the board in the light of the statutes, State Board Rules, considerations of public policy, the right of individuals and the common sense factors that bear upon the particular issue. In this as in many other areas of school administration, legal advice must play a crucial role.

VI

Processing the Tenure Teacher Dismissal Case

IRVING C. EVERS, ESQ.

Irving C. Evers is a graduate of the John Marshall College of Law. Engaged in the general practice of law in Hackensack, Mr. Evers serves as counsel to numerous boards of education in northern New Jersey. A member of the Bergen County, New Jersey State and American Bar Associations, the American and New Jersey Trial Lawyers Associations, and the New Jersey Institute of Municipal Attorneys, he serves as president of the New Jersey Association of School Board Attorneys and as eastern law reporter for NOLPE. Mr. Evers is the author of numerous articles appearing in the NOLPE School Law Journal and in The Urban Lawyer.

Teaching staff members who acquire tenure in New Jersey under the provisions of *R.S.18A:28-5 may not be dismissed or reduced in compensation except in accordance with the provisions of the Tenure Employees Hearing Law, R.S. 18A: 6-10 et seq., although it should be noted at the outset that nothing in the Tenure Employees Hearing Law prevents the reduction of the number of any persons holding tenured positions for the reasons stated.

The grounds set forth in the statute for the removal of tenured employees are inefficiency, incapacity, unbecoming conduct, or other just cause.

If the charges against a teacher is that of inefficiency, such a charge may not be forwarded to the Commissioner unless at least 90 days prior thereto and within the current or preceding school year the board or superintendent of schools of the district has given to the employee, against whom such charge is made, written notice of the alleged inefficiency, specifying the nature thereof with such particulars as to furnish the employee an opportunity to correct and overcome the same. R.S. 18A:6-12. When the teacher is not given the 90 day notice, the Commissioner will dismiss the charges.[1] In addition,

*All R.S. references are the same as reference to N.J.S.A.

a charge of inefficiency will also be dismissed absent a showing or an offer of proof that the inefficiency had in fact continued during the 90 day period allowed the teacher to "correct and overcome" the same.[2] R.S. 18A:6-12.

Where a board does not make a determination within 45 days after receipt of written charges, or within 45 days after the expiration of the time for the correction of the inefficiency, if the charge is of inefficiency, the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon. R.S. 18A:6-13.

The pertinent provisions of Title 18A specifically set forth the exact procedure to be followed in connection with tenure hearings and these provisions should be carefully followed.

R.S. 18A:6-11 provides as follows: "If written charge is made against any employee of a board of education under tenure during good behavior and efficiency, it shall be filed with the secretary of the board and the board shall determine by majority vote of its full membership whether or not such charge and the evidence in support of such charge would be sufficient, if true in fact, to warrant a dismissal or a reduction in salary, in which event it shall forward such written charge to the Commissioner, together with certificate of such determination."

The practice which I have followed in connection with the filing of charges is to prepare a statement of the individual charges which begins as follows: "Pursuant to the provisions of R.S. 18A:6-10 et seq., the following charges of conduct unbecoming a teacher and conduct otherwise improper are hereby preferred against John Doe, a teacher under tenure, in the Blackacre School System, to wit." Then follow the charges.

At the end of the charges, I have the following statement appended: "The undersigned, Richard Roe, hereby prefers the foregoing charges against John Doe, a teacher under tenure in the Blackacre School System, pursuant to the provisions of R.S. 18A:6-10 et seq. and request that the board shall determine whether or not the charges and the evidence in support thereof are sufficient to justify further proceedings in accordance with the statutes in such cases made and provided." This statement should, of course, be dated.

At this point one thing should be made crystal clear. R.S. 18A:6-11 requires the board to determine by a majority vote of its full membership whether charges should be forwarded to the Commissioner. It does not require that a board of education afford to a teacher the right to be heard on the question as to whether or not charges should in fact be forwarded. The function of a board in such instances is similar to that of a Grand Jury.[3]

Where charges are preferred, the teacher may be suspended with or without pay, pending final determination. If the charge is dismissed, the person shall be reinstated immediately with full pay as of the time of such suspension. R.S. 18A:6-14.

Under R.S. 18A:6-30 it is provided that any person holding office, position or employment in the public school system of the state, who shall be illegally dismissed or suspended therefrom, shall be entitled to compensation for the period covered by the illegal dismissal or suspension, if such dismissal or suspension shall be finally determined to have been without good cause, upon making written application therefor with the board or body by whom he was employed, within 30 days after such determination.

The term "compensation" as used in R.S. 18A:6-30 is broader than the term "salary" and where a statute uses the term "compensation" instead of "salary,"

any earnings of the individual between the time of the suspension and a determination of reinstatement can be offset against a claim for back compensation.[4]

Where it has been determined to forward charges against a teacher to the Commissioner of Education, the board, under R.S. 18A:6-15, is required to forthwith serve a copy of every written charge which is determined to be sufficient and to be supported by sufficient evidence, if true in fact, to warrant dismissal or a reduction in salary and a copy of its certification of determination upon the employee against whom the charge has been made personally or by certified mail directed to his last known address immediately after such determination, and the Commissioner is also required to forthwith serve a copy of every written charge upon the person against whom the charge has been made in the same manner immediately after receipt thereof.

I have used the following form of Certification to be annexed to charges to be served:

"I hereby Certify that the attached Charges, and the evidence in support thereof, were determined by the Blackacre Board of Education, at a meeting held on the_____day of_____, to be sufficient, if true, to warrant a dismissal or a reduction in salary.

I further Certify that said determination was made by a majority of the full membership of the Board.

_____

Joseph Doe
Board Secretary"

If the charge is one based on inefficiency, then the Certification should also recite that the employee was given at least ninety days prior written

notice of the nature and particulars of the alleged inefficiency. Rule 8:24-22.

Also in connection with the adoption of charges, I recommend the adoption of a Resolution along the following lines:

"Whereas, written charges have been made against John Doe, a suspended teacher in the Blackacre High School under tenure during good behavior and efficiency; and

Whereas, said charges have been filed with the Secretary of the Board; and

Whereas, said charges and the evidence in support thereof, have been determined by a majority vote of the full membership of the Board to be sufficient, if true in fact, to warrant dismissal or a reduction in salary;

Now, Therefore, Be It Resolved, by the Blackacre Board of Education that two copies of said charges, together with a certificate of such determination, be forwarded forthwith to the Commissioner of Education; and

Be It Further Resolved that the Secretary of this Board be and he hereby is ordered and directed to prepare and execute the aforementioned Certificate; and

Be It Further Resolved that the Secretary of this Board be and he hereby is Ordered and Directed to forthwith serve a Copy of said charge, together with the Certificate herein before referred to upon the said John Doe either personally or by Certified Mail to his last known address."

It is thus to be noted that the teacher in question is served twice--once by the board and once by the Commissioner.

When the charges are received by the Commissioner, he, or the person appointed to act in his behalf, examine the charges and certification and if he is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If he determines that the charges are sufficient to warrant dismissal or reduction in salary of the person charged, he shall conduct a hearing thereon within a 60-day period after the receipt thereof upon a reasonable notice to all parties in interest. R.S. 18A:6-16.

While I have been referring to charges in this discussion, it is not recommended that a board seek to rely on a single instance to dismiss a teacher without giving due consideration to the teacher's overall record. In at least one case where a teacher was charged with improperly and unnecessarily doing physical violence, even though the Appellate Division found the charge had been proven, and that disciplinary action was warranted, it held that dismissal, in the case of a teacher who had served a great many years in the New Jersey school system, was an unduly harsh penalty.[5]

While it is recognized that as a general rule a board of education may not, in the absence of express authorization, incur an obligation which extends beyond its life, a board may file charges against a teacher based on incidents which occurred prior to the life of the board.[6]

Where a hearing is held by the Commissioner, the local board is a party and the hearing is conducted in accordance with the rules and regulations adopted by the Commissioner and approved by the state board. R.S. 18A:6-17.

Under rules adopted by the Commissioner, the rule requiring the filing of a Petition does not apply. The filing of the written charges takes the place of the filing of a Petition.[7]

While the rules that I have seen do not provide for discovery proceedings, the Commissioner has permitted discovery to be utilized. In at least one decision that I am aware of, the State Board of Education has approved the use of Interrogatories.[8]

It is suggested that the careful drafting of charges against a tenure employee may make unnecessary the use of discovery proceedings. Certainly a teacher whose removal is sought has a right to know specifically the basis of charges against him.

On June 22, 1971, the Commissioner of Education had occasion to pass upon a series of 27 charges made against a tenure teacher in The Matter of the Tenure Hearing of Herman B. Nash, School District of the Township of Teaneck, Bergen County. These charges are set forth at length in the Commissioner's Decision. They were prepared by me and, in their preparation, I tried to be as specific as possible. No discovery was sought as to any of the charges, one of which was withdrawn during the hearing. Of the remaining charges, it was held that eight had not been sufficiently established; all the remaining charges were held to have been established. By way of illustration as to the detailed nature of charges, I refer you to charges 2, 3, and 5:

> CHARGE 2. That on or about March 6, 1969, the said Herman Nash having the responsibility under the provisions of R.S. 18A:25-2 to hold pupils under his authority accountable for disorderly conduct in school, did in violation of his responsibilities and duties and contrary to the provisions of the statute aforesaid, did urge, counsel advise and abet pupils under his authority to commit acts of disorderly conduct by leading said pupils into the office of the principal of the Teaneck High School when said pupils had no lawful right to be there, and then and there did seize control of said office.

> CHARGE 3. That on or about March 6, 1969, the said Herman Nash, knowing full well that pupils in the public schools are required, under the provisions of R.S. 18A:37-1 to comply with the rules

established in pursuance of law for the government of such schools, to pursue the prescribed course of study and submit to the authority of the teachers and others in authority over them, did, nevertheless, in violation of the provisions of said statute, urge, counsel, advise, abet and lead his pupils in defying lawfully constituted authority by illegally and improperly seizing the office of the principal of the Teaneck High School.

CHARGE 5. That on or about March 6, 1969, the said Herman Nash, having failed and refused to carry out his teaching duties, and after having been ordered by his principal to resume his teaching duties and having refused to obey said orders, was then suspended by Joseph Killory, Superintendent of Schools and ordered to report to the Central Office; that notwithstanding said Order by the Superintendent of Schools, he failed and refused to obey same.

The normal procedure which is followed in a tenure hearing case is similar to that followed in other matters presented to the Commissioner. After the filing of an answer, there is a conference of the parties at the office of the Commissioner,[9] following which a hearing or hearings will be scheduled, usually at the office of the County Superintendent of Schools.

The normal practice is to hold formal hearings at which the testimony of witnesses is taken under oath by a certified shorthand reporter. The Commissioner is not bound by strict rules of evidence. Subpoenas may be issued in the discretion of the Commissioner upon request of any party.[10]

If required by the Commissioner, testimony as to the facts involved may be presented by the parties in the form of written statements verified by oath and accompanied by certified copies of all official documents, and the original or verified copies of all other documents, necessary to a full understanding of the questions involved. R.S. 18A:6-24.

As to the quantum of proof required in order to sustain a charge of conduct unbecoming a public employee, such charge must be sustained by a preponderance of the believable evidence.[11]

The acquittal of an individual of a criminal charge in a criminal proceeding is not res judicata in a subsequent disciplinary proceeding based on substantially the same charge or conduct.[12]

In connection with the testimony to be presented at a hearing, careful note should be made of the fact that the Commissioner has ruled that the testimony of children must be examined with extreme care.[13] It is therefore most advisable, in connection with the preparation of charges, to have available at the hearing, if at all possible, testimony other than or most certainly in addition to, testimony to be elicited from children.

Where testimony of children is to be relied on heavily, I advise the taking of statements of every pupil in a class, where charges are to be based on classroom incidents, even if the statements are completely negative. Sometimes negative statements can be as useful as positive ones, even if the effect of them is only to neutralize sworn testimony given at a hearing. Boards have a right to interrogate pupils and their parents do not have to be present when this is done.[14]

After the hearing has been closed, the Commissioner is required to make a determination within 60 days from the closed date. The determination is required to be in the form of a written decision containing findings of fact upon which the determination is based. The decision is required to be served upon the parties and the decision is binding unless and until reversed upon appeal. R.S. 18A:6-25.

Appeals from the Commissioner go to the State Board of Education. R.S. 18A:6-27. Appeals to the State Board are required to be taken in the manner prescribed by the Rules of that Board within 30 days after the decision

appealed from is filed and that Board has the power to hear and determine any such appeal. R.S. 18A:6-28.

Present State Board rules require the service by registered, certified or ordinary mail with an Affidavit of Mailing or personal service upon the adverse party or his attorney of a Notice identifying the decision and stating that an appeal is taken to the State Board of Education from it, or from such part of it as may be specified.[15]

Within 20 days after the appeal has been taken, the appellant is required to file with the Secretary of the State Board of Education 14 copies of the points on which he relies, which shall contain accurate references to the evidence and authorities in support of said points. A copy thereof shall be served upon the respondent or his counsel who then has 10 days to file 14 copies of his answering points and references to the evidence and authorities with the Secretary of the Board and one copy upon the appellant or his counsel. It is the obligation of the Secretary of the State Board to forthwith transmit copies of the points so filed to the chairman of the Law Committee. The chairman thereafter fixes a time and place for the hearing of the appeal, unless both parties, by notice filed with and prefixed to his points, shall request an oral hearing. Further memoranda or briefs may be received by the Law Committee at its discretion at or subsequent to the hearing.[16]

Notice of hearings on appeal are sent by the chairman of the Law Committee to counsel who have appeared for the parties in the proceedings. All such notices shall specify the time and place of the session of the Law Committee at which the appeal will be heard. The Law Committee shall consider all such appeals and report and recommend its conclusions thereon to the State Board which shall thereupon decide each appeal by resolution in open meeting.[17]

Some final words as to overall considerations would appear to be in order at this point.

Charges against a tenured employee should not be considered lightly. Before formal charges are filed, I recommend a careful analysis of the teacher's entire record. Serious consideration should be given to including within the charges any adverse material which reflect upon the teacher's abilities, capabilities and overall conduct. It would also be advisable to examine the decisions of the Commissioner in cases which may be considered as precedents. Sometimes an analysis of those decisions will disclose that what would appear to call for a certain result does not necessarily result in what one would think should have been the outcome.

In one case, for example, the use of corporal punishment by a teacher was held to have been established as alleged in 17 separate charges. Yet, dismissal of a teacher, who was advanced in years was not ordered. A period of suspension was held sufficient, together with a reduction in salary.[18]

Corporal punishment cases have had some interesting rulings. The Commissioner has ruled that while he does not condone the use of corporal punishment, where an incident is not of itself a sufficiently flagrant violation, neither a dismissal nor a reduction of salary is warranted.[19]

An inadvertant touching does not constitute the use of corporal punishment. An intent to punish must be established when corporal punishment is charged.[20]

Yet where the use of corporal punishment is demonstrated to be severe enough, dismissal will be ordered.[21]

It is difficult to formulate any hard and fast rules which will serve as any specific guide to boards of education. Each individual case must be con-

sidered on its merits. As I have indicated above, the Commissioner, the State Board of Education, and our courts consider the overall picture and the record of service of the teacher in question. Any action regarded as unduly severe will be set aside in toto or at least modified.

This does not mean that because difficulties are posed by the institution of tenure proceedings that such proceedings should not be undertaken. It merely suggests that where a board determines to institute proceedings against a tenure employee, that it prepare its case thoroughly and completely and that it not start the ball rolling until it is satisfied that it has made every effort to fortify its position and that it is in a position to justify a demand that the Commissioner take appropriate action against the employee in question.

1. Matter of Tenure Hearing of Alfred E. Jakucs, 1968 S.L.D. 189. Cf. Matter of Tenure Hearing of Thos. Appleby, November 25, 1969; aff'd by the State Board of Education, October 7, 1970.

2. Matter of Tenure Hearing of Consuelo Garcia, November 12, 1970.

3. Opinion of Commissioner on Motion in Matter of Tenure Hearing of John M. Nies, 1962; Matter of Tenure Hearing of Thos. Appleby, November 25, 1969; Matter of Tenure Hearing of James Norton, January 3, 1969.

4. Mullen v. Board of Education of Jefferson Township, 81 N.J. Super 151 (App. Div. 1963); Romanowski v. Board of Education of the City of Jersey City, 1966 S.L.D. 219; Lowenstein v. Newark Board of Education,35 N.J. 94, 123 (1961).

5. In re Fulcomer, 93 N.J. Super 404 (App. Div., 1967); 1967 S.L.D. 201.

6. Matter of Tenure Hearing of Thos. Appleby, November 25, 1969; aff'd by State Board 10/7/70.

7. Rule 8:24-21.

8. Matter of the Tenure Hearing of Thos. Appleby, Footnote 1, supra.

9. Rule 8:24-9.

10. Rule 8:24-13.

11. Smith v. Board of Education of the City of Camden, 1966 S.L.D. 107.

12. In re Darcy, 114 N.J. Super 454 (App. Div. 1971).

13. Matter of the Tenure Hearing of Elsie Rice, March 26, 1970; Matter of the Tenure Hearing of Mary Worrell, November 16, 1970; Matter of the Tenure Hearing of Pauline Nickerson, 1965 S.L.D. 130; Matter of the Tenure Hearing of Mary Louise·Connolly, July 2, 1971; Matter of the Tenure Hearing of Victor J. Mastronardy, 1968 S.L.D. 89.

14. Parents, on behalf of "W.E." v. Board of Education of the City of Rahway, April 26, 1971; In the Matter of "G", 1965 S.L.D. 146.

15. Rule 8:2-2

16. Rule 8:2-4

17. Rule 8:2-5

18. Matter of Tenure Hearing of Mary Worrell, November 16, 1970.

19. Matter of Tenure Hearing of Louis Guadagnino, June 25, 1970; Cf. Matter of Tenure Hearing of Fred'k L. Ostergren, 1968 S.L.D. 185.

20. Matter of Tenure Hearing of Pauline Nickerson, 1965 S.L.D. 130.

21. Matter of Tenure Hearing of James Norton, September 2, 1969.